89-847

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1989

STUDIO ART THEATRE OF EVANSVILLE, INC.,

*Petitioner.*

v.

STATE OF INDIANA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

*– AND APPENDICES –*

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## QUESTIONS PRESENTED

I.

DOES A STATE VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THIS COURT'S DIRECT HOLDINGS IN *BUTLER* v. *MICHIGAN*, 352 U.S. 380 (1957), *BOLGER* v. *YOUNGS DRUG PRODUCTS CORP.*, 463 U.S. 60 (1983), AND *SABLE COMMUNICATIONS OF CALIFORNIA, INC.*, v. *F.C.C.*, 492 U.S. —, 106 L.ED.2D 93 (1989), BY CRIMINALIZING AND USING AS A PREDICATE ACT FOR A RICO CHARGE, THE SALE OR DISPLAY TO ADULTS OF *NON*-OBSCENE EXPRESSIVE MATERIALS WITHIN 500 FEET OF A CHURCH OR SCHOOL, BASED UPON A STANDARD OF WHAT IS OBSCENE AS TO MINORS, PARTICULARLY WHERE THE MATERIALS ARE NEITHER SOLD TO NOR DISPLAYED TO MINORS?

II.

DOES I.C. § 35-49-3-3(3) VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND THIS COURT'S DIRECT HOLDINGS IN *LEMON* v. *KURTZMAN*, 403 U.S. 602 (1971) AND *LARKIN* v. *GRENDEL'S DEN, INC.*, 459 U.S. 116 (1982), BY ESTABLISHING A STATUTORY PREFERENCE FOR CHURCHES OVER BUSINESSES TRADING IN NON-OBSCENE CONSTITUTIONALLY PROTECTED EXPRESSIVE MATERIALS, AND BY EXCESSIVELY ENTANGLING THE AFFAIRS OF GOVERNMENT WITH THE AFFAIRS OF THE CHURCH, BY REQUIRING THE STATE TO PROSECUTE THE SALE OR DISPLAY OF OTHERWISE CONSTITUTIONALLY PROTECTED MATERIALS, ON THE SOLE BASIS OF THE LOCATION OF A CHURCH?

III.

DO THE STATUTES WITH WHICH PETITIONER WAS CHARGED AND CONVICTED, VIOLATE THE EQUAL PRO-

TECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY ESTABLISHING AN ARBITRARY CLASSIFICATION FOR CRIMINAL PUNISHMENT, THAT BEING THOSE BUSINESSES OR INDIVIDUALS WHO SELL OR DISPLAY NON-OBSCENE, AND THUS CONSTITUTIONALLY PROTECTED, MATERIALS WITHIN 500 FEET OF A CHURCH OR SCHOOL, WHILE ARBITRARILY EXCLUDING CERTAIN SCHOOLS, MUSEUMS, AND LIBRARIES FROM THE STATUTES' CRIMINAL PROSCRIPTION?

IV.

WAS PETITIONER DENIED ITS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY BEING CHARGED BY AND CONVICTED UPON AN AMENDED INDICTMENT THAT HAD NEVER BEEN PRESENTED TO A GRAND JURY FOR CONSIDERATION OR ENDORSEMENT?

## LIST OF PARTIES AND RULE 28.1 LIST

The Petitioner before this Court is Studio Art Theatre of Evansville, Inc. The Respondent before this Court is the State of Indiana.

The corporate Petitioner, Studio Art Theatre of Evansville, Inc., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1

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October Term, 1989

STUDIO ART THEATRE OF EVANSVILLE, INC.,

*Petitioner,*

v.

STATE OF INDIANA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Indiana entered in this proceeding on November 22, 1988.

### OPINION BELOW

The order of the Supreme Court of Indiana denying transfer, without opinion, is an unpublished order dated September 21, 1989, a copy of which is included as Appendix A. The opinion of the Court of Appeals of Indiana is reported at 530 N.E.2d 750 (1989), and is reproduced as Appendix B.

### JURISDICTION

The Supreme Court of the State of Indiana entered its order denying transfer, without opinion, on September 21, 1989. This petition is filed within 60 days of that date. The order of the Indiana Supreme Court constitutes a final judgment in a criminal case upholding the

constitutionality of the statutes involved in Petitioner's conviction under Indiana's State RICO law, I.C. §§ 35-45-6-1, *et seq.* Therefore, this Court has jurisdiction in this criminal action pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the First, Fifth, and Fourteenth Amendments to the United States Constitution, and applicable Indiana Statutes, are set forth in Appendix C. The Indiana Code sections so included are: I.C. § 34-4-30.5-3(a), § 35-34-1-2(b)(1), § 35-34-1-4(a)(10), § 35-34-2-12(b)(2) & (3), §§ 35-45-6-1 through 35-45-6-2, § 35-49-2-2, §§ 35-49-3-3 through 35-49-3-4, § 35-50-2-6, and § 35-50-3-2.

## STATEMENT OF THE CASE

Petitioner Studio Art Theatre of Evansville, Inc. operates a retail adult entertainment business in the City of Evansville, Indiana. On April 29, 1986, the State of Indiana filed a one-count Indictment against Petitioner and others, charging each defendant with violating the Indiana Criminal Racketeer Influenced and Corrupt Organizations Act, I.C. § 35-45-6-2(a)(3), predicated upon their alleged participation in 29 separate acts of violating various provisions of the Indiana Obscenity Statutes; I.C. §§ 35-49-3-1 through 35-49-3-3. This Indictment can be found as Appendix D. Four of those predicate acts (numbers 18, 19, 22, and 23 of the Indictment) involved alleged violations of I.C. § 35-49-3-3(3), regarding the sale or display for sale to *any person*, matter that is "harmful to minors" within

500 feet of the nearest property line of a school or church.[1]

On December 8, 1986, Petitioner filed a Motion to Dismiss the Indictment, alleging, among other grounds, that the Indictment lacked the necessary allegation that the Defendants had acted "knowingly." At hearing on the Motion to Dismiss, the State of Indiana orally moved to amend the Indictment to add the word "knowingly" between the words "did" and "participate in the activities" on the first page of the Indictment. Over objection, the court permitted this amendment, while denying Petitioner's Motion to Dismiss, in its entirety, including arguments that the Indiana RICO Statute, using violations of I.C. § 35-49-3-3(3) as predicate offenses, was unconstitutional, both on its face, and as applied in this matter. Appendix E. On June 4, 1987, the State of Indiana filed its amended Indictment.[2] On June 11, 1987, Petitioner filed a Motion to Dismiss Amended Indictment for Lack of Jurisdiction, predicated upon, among other things, that the amended Indictment had not been signed by the foreman of the Grand Jury or five (5) members of the Grand Jury as required by I.C. §§ 35-34-1-2(b)(1) and 35-34-2-12(b)(3), and further failed to contain the words "a true bill" as required by those Statutes, with the trial court denying this Motion on June 15, 1987. Appendix G.

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[1] Those four predicate acts involved the display of the films "Teenage Runaway" and "Seduction of Lana Shore," and the sale of the films "Boys in the Bath" and "Guishe's [*sic*] Slave" to Gerald Wingerter, an Evansville Police Officer.

[2] The amended Indictment is set forth as Appendix F. The amended Indictment was, in all material respects, identical to the original Indictment except for the inclusion of the word "knowingly," the lack of the Grand Jury authorization thereon, and the removal of 10 predicate acts.

Prior to trial, Petitioner waived its right to trial by jury. Contemporaneous to the entry of a "Stipulation of Facts" entered into between the State and Petitioner for use at trial (Appendix H), all other Defendants, besides Petitioner, were dismissed from the action below, and all predicate acts, with the exception of predicate acts 12, 13, 14 and 15 of the amended Indictment, those being the alleged violations of I.C. § 35-49-3-3(3) relating to the sale and display of material "harmful to minors" within 500 feet of a church or school (corresponding to predicate acts 18, 19, 22 and 23 of the original Indictment), were dismissed. The matter was then submitted for bench trial on October 19, 1987, the evidence limited to the entered Stipulation of Facts.

That stipulation agreed that while the films "Teenage Runaway," "Seduction of Lana Shore," "Boys in the Bath," and "Geisha's Slave" appealed to the prurient interest in sex *of minors*, that they were patently offensive to the prevailing standards in the adult community with respect to what is suitable matter *for minors*, and that they lacked serious literary, artistic, political or scientific value *for minors*, it was also true that the films "Boys in the Bath" and "Geisha's Slave" were sold to Gerald Wingerter, an *adult* customer and an Evansville City Police Officer, and that there was:

> ". . . no allegation, issue or evidence presented in this case by the amended Indictment that minors under the age of eighteen (18) were ever upon, had access to or otherwise could view the display of any material, books, magazines or films on the business premises of Studio Art from the exterior thereof, including but not limited to the display of the video cassette films entitled "Teenage Runaway" and "Seduction of Lana Shore". That the sale of the films "Boys in

> the Bath" and "Geisha's Slave" on February 6, 1986, to Gerald Wingerter were sales to an adult customer of the Studio Art inside the business premises of the said Studio Art." Stipulation of Facts, ¶ 19.

On December 14, 1987, the Court entered its Findings of Fact and Conclusions of Law, finding Petitioner guilty of violating the State RICO Statute, I.C. §§ 35-45-6-1, *et seq.*, predicated upon the four charged violations of I.C. § 35-49-3-3(3), selling or displaying to any person, material statutorily deemed *"harmful to minors."* Appendix I. As a result of that finding, the Court entered a judgment and fined Petitioner the sum of Five Thousand ($5,000.00) Dollars, and costs. On February 10, 1988, Petitioner timely filed a Motion to Correct Errors, that Motion being denied by the trial court on February 11, 1988.

Petitioner then timely appealed to the Court of Appeals of Indiana, with that court denying Petitioner's request for oral argument on November 4, 1988. On November 22, 1988, the Court of Appeals of Indiana issued its opinion, reported at 530 N.E.2d 750 (1988) (Appendix B). It must be noted that the Indiana Court of Appeals did not specifically address the constitutionality of I.C. § 35-49-3-3(3) and its predicate use for a RICO violation, although fully raised by Petitioner below. In fact, Petitioner filed a Petition for Rehearing to the Indiana Court of Appeals, specifically addressing the fact that the opinion of the Indiana Court of Appeals had failed to discuss the specific constitutional issues raised below. Appendix J. This Petition was denied on January 31, 1989. Appendix K. For this reason, as an alternative to granting certiorari, this Court may wish to certify questions back to the Indiana Appellate

Courts to address this crucial constitutional concern. See a more detailed discussion, *infra*, at footnote 7.

Petitioner then timely filed a Petition to Transfer to the Indiana Supreme Court. On September 21, 1989, the Indiana Supreme Court, in a 3-2 decision, denied transfer without opinion (Appendix A). In the minority, Chief Justice Shepard and Justice Debruler voted to grant transfer.

## REASONS FOR GRANTING THE WRIT

### I.

**THE INDIANA RICO STATUTE, UTILIZING I.C. § 35-49-3-3(3) AS A PREDICATE OFFENSE REGARDING THE SALE OR DISPLAY FOR SALE TO ANY PERSON MATTER THAT IS HARMFUL TO MINORS WITHIN 500 FEET OF THE NEAREST PROPERTY LINE OF A SCHOOL OR CHURCH, ON ITS FACE AND AS APPLIED, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES UNDER THE DIRECT HOLDINGS OF *BUTLER* v. *MICHIGAN*, 352 U.S. 380 (1957), *BOLGER* v. *YOUNGS DRUG PRODUCTS CORP.*, 463 U.S. 60 (1983), AND *SABLE COMMUNICATIONS OF CALIFORNIA, INC.*, v. *F.C.C.*, 492 U.S. ___, 106 L.ED.2D 93 (1989).**

Last term, in the case of *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. ___, 103 L.Ed.2d 34 (1989), this Court held that the sale or distribution of *obscene* material, in violation of a specific "obscenity" statute, could be constitutionally used as a predicate offense to support a conviction under the Indiana RICO Statute. This is not such a case. The questions involved here, not addressed in *Fort Wayne Books*, are, rather, whether the constitutionally protected sale or display of *non*-obscene material to adults can be mechanistically transformed into

the criminally proscribable sale or display of materials deemed "harmful to minors," due to the simple fact that the place of sale or display of such material may be in close proximity to a church or school, *even though not a single minor either obtained, had access to, nor could even view the materials at issue,* and, by the same token, whether such dissemination or display of otherwise non-obscene material can be used as a predicate offense to substantiate the enhanced penalties of a RICO charge.[3]

While it was stipulated below that the materials at issue fulfilled the statutory requirements to be deemed "harmful to minors," there were no allegations, and, therefore, no findings that any of the materials were obscene as to adults [pursuant to this Court's pronouncement in *Miller* v. *California*, 413 U.S. 15 (1973)], nor was there any contention that the materials here were either sold, displayed, or made accessible to even a single minor (and thus not criminally proscribable

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[3] The penalties of a RICO conviction include the forfeiture provisions as set forth in I.C. § 34-4-30.5-3(a). It is also relevant to note that RICO violations predicated upon the sale or display of *non*-obscene material (as to adults) in violation of I.C. § 35-49-3-3(3), would carry a penalty of being a "Class C felony" (pursuant to I.C. § 35-45-6-2, potentially a five year jail term plus three additional years for aggravation, together with a $10,000.00 fine — I.C. § 35-50-2-6), a far stiffer penalty than of either selling, distributing or exhibiting *actually obscene* (as to adults) material, or even of actually selling to or displaying to minors those materials that are statutorily deemed to be harmful to them (both being "Class A misdemeanors" pursuant to I.C. §§ 35-49-3-1 and 35-49-3-3, carrying a maximum one-year jail sentence and a maximum fine of $5,000.00). While this Court noted in *Fort Wayne Books* that stiffer RICO penalties were constitutional in the respect of providing a legitimate means of deterring the sale of *obscene* (as to adults) materials, here, more severe penalties apply to the sale of *non*-obscene materials, than do apply to non-RICO related violations regarding actually obscene, or obscene as to minors, material. Thus, there is, here, not a deterrent to trafficking in *obscene* materials, but, rather, there is a clear chilling of dealing in *non*-obscene, constitutionally protected material.

pursuant to this Court's decision in *Ginsberg* v. *New York*, 390 U.S. 629 (1968)).[4] Thus, the four films at issue continue to enjoy the full protection under the First and Fourteenth Amendments. *Joseph Burstyn* v. *Wilson*, 343 U.S. 495 (1952); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981).

This Court has consistently held that "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986), citing *Carey* v. *Brown*, 447 U.S. 455, 462-463 and n. 7 (1980); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). As I.C. § 35-49-3-3(3) is content based (specifically directed at materials "harmful to minors" based on the depictions therein), to be upheld, this statute must pass the "most exacting scrutiny" of being necessary to a compelling State interest, and must be narrowly drawn to achieve that end. *Widmar* v. *Vincent*, 454 U.S. 263, 270 (1981), citing *Carey, supra*, at 461.

Petitioner contends that the facial unconstitutionality of I.C. § 35-49-3-3(3) is directly addressed by this Courts' previous decision in *Butler* v. *Michigan*, 532 U.S. 380 (1957). In that case, this Court was confronted with a criminal statute proscribing material ". . . intending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." *Id.*, at 381. As noted by this Court, this statute "criminalized" conduct to:

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[4] The Indiana statutory definition of matter that is deemed to be "harmful to minors" includes a basically verbatim reiteration of the tri-partite test for what may be considered to be "obscenity to minors," as set forth in *Ginsberg, supra*, and modified as to the third prong in *Miller, supra*. See I.C. § 35-49-2-2, in Appendix C.

> "... make available for the general reading public ... a book ... found to have a potentially deleterious influence upon youth." *Butler, supra,* 382-383.

In the unanimous *Butler* opinion, striking down the statute as unconstitutionally overbroad, Justice Frankfurter wrote:

> "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig." *Butler, supra,* at 383.

In *Bolger* v. *Youngs Drug Products Corp.,* 463 U.S. 60 (1983), twenty-five years after the Court issued its *Butler* opinion, this Court firmly reiterated its position by simply stating:

> "... the government may not 'reduce the adult population ... to reading only what is fit for children'." *Id.,* at 73, citing *Butler, supra,* at 383.

This Court's clear position on this issue has never wavered, and, in fact, was reasserted in last terms decision of this Court in *Sable Communications of California, Inc* v. *F.C.C.,* 492 U.S. __, 106 L.Ed.2d 93 (1989). The mandates of *Butler, Bolger,* and *Sable Communications, supra,* clearly dictate that a State's purported interest in the protection of minors may not be employed as a means with which to stifle or, as in this case, totally preclude an adults access to communication he or she is entitled to receive.[5] Even if the

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[5] While the provisions of I.C. § 35-49-3-3(3) may be an attempt as "protection" of minors, it is of interest to note that neither the

(*concluded on page 10*)

protection of minors (which Petitioner concedes to be a legitimate state purpose) is the purported purpose of the distance provision in the statute, that distance requirement adds no further protection, as minors are properly protected by the statutes criminalizing the sale, display, or access to minors of materials harmful to them. See I.C. §§ 35-49-3-3(1),(2),(4) and (5).[6]

Numerous statutes of other states have been struck down and found facially invalid for precisely this same unconstitutionally impermissible overbreadth basis. See, for example, *American Booksellers Association, Inc* v. *McAuliffe*, 533 F.Supp. 50 (N.D. Ga. 1981); *Tattered Cover, Inc.* v. *Tooley*, 696 P.2d 780 (Colo. 1985); *American Booksellers Association, Inc.* v. *Superior Court*, 129 Cal. App. 3d 197 (1982). See also *Home Box Office* v. *Wilkinson*, 531 F.Supp. 986 (D.C. Utah 1982), where a state statute prohibiting the distribution of sexually explicit materials over cable television was declared unconstitutional on overbreadth challenges. As the overbreadth of I.C. § 35-49-3-3(3) is "substantial," it must be invalidated on its face. *New York* v. *Ferber*, 458 U.S. 747, 769-770 (1982).

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(*continued from page 9*)

term "school" or "church" is defined in this provision so as to require the attendance or presence of minors. Thus, the presence of a trade school or college, having no minors whatsoever, would still potentially invoke the same penalties for the purported purpose of "protecting" minors, as would the proximity of a nursery school. These terms not being narrowly defined, this statute also fails as being void-for-vagueness. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972).

[6] In fact, it is relevant to note that of the five subsections of I.C. § 35-49-3-3 dealing with the proscription of materials deemed harmful to minors, only the subsection that Petitioner was charged with, that being subsection (3), does not require that a minor actually purchase, view, or have access to the offending materials.

As to Petitioner's "as applied" challenge, in the instant case, each sale charged as a predicate act was a sale made to an adult, minors not being permitted on the premises. Stipulation of Facts, Appendix H, at ¶¶ 18 and 19. Similarly, the "display" of the materials was only to adults, as, pursuant to the stipulation at trial, there were no allegations that any minors could view these materials. Stipulation of Facts, Appendix H, at ¶¶ 18 and 19. The necessary and unavoidable effect of this statute is to criminalize the [constitutionally protected] sale of *non*-obscene materials to adults, while providing absolutely no additional protection for minors than is already adequately addressed in I.C. § 35-49-3-3(1),(2),(4), and (5). The sweep of this statute is thus impermissibly overbroad.

In addition, this Court should use this opportunity to consider and set parameters regarding "display" type statutes which this Court queried in *Virginia* v. *American Booksellers Association, Inc.*, 484 U.S. ___, 98 L.Ed.2d 782 (1988), but which it did not fully decide.[7] In *American Booksellers*, this Court certified two questions to the Virginia Supreme Court, the latter question (regarding interpretation of the specific Virginia Statute that criminalized "the display for commercial purpose in a manner whereby juveniles may examine or peruse" certain material) asked:

> "[I]s the provision complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no

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[7] See answer to certified questions in *Commonwealth* v. *American Booksellers, Inc.*, 372 S.E.2d 618 (Va. 1988); after remand *American Booksellers Association, Inc.*, v. *Commonwealth of Virginia*, 882 F.2d 125 (4th Cir. 1989).

> action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were announced or otherwise manifested to the public?" *American Booksellers, supra,* 98 L.Ed.2d at 797.

The import of this query appears to be directed specifically at the issue raised herein: May a State criminalize the display of materials that may potentially be "harmful to minors," *even though minors are never given access to such displays.* This action presents an ideal opportunity for this Court to set forth guidelines for the criminalization of display of certain materials that may be deemed to be "harmful to minors."[8]

The State of Indiana may not justify I.C. § 35-49-3-3 (3) and its inclusion as a predicate offense under RICO on the basis that it is limited to areas within five hundred feet of a school or church, for the exercise of First Amendment rights may not be diminished or curtailed simply on the basis that they may be exercised elsewhere. *Schad* v. *Borough of Mount Ephraim,* 452 U.S. 61, 76-77 (1981); *Southeastern Promotions Ltd.* v. *Conrad,* 420 U.S. 546, 556 (1975); *Schneider* v. *State,* 308 U.S. 147, 163 (1939).

Nor can the State justify the statute as a zoning ordinance containing a type of "distance separation" clause

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[8] Several courts have declared such "display" statutes unconstitutional. See, for example, *American Booksellers Association, Inc.* v. *Webb,* 643 F.Supp. 1546 (N.D. Ga. 1986); *Rushia* v. *Town of Ashburnham,* 582 F.Supp. 900 (D.Mass. 1983); *American Booksellers Associations* v. *McAuliffe, supra; Tattered Cover, Inc.* v. *Tooley, supra; American Booksellers Associations, Inc.* v. *Superior Court, supra; Calderon* v. *City of Buffalo,* 402 N.Y.S. 2d 685 (1978), but see *Upper Midwest Booksellers Association* v. *Minneapolis,* 780 F.2d 1389 (8th Cir. 1985); *M.S. News Company* v. *Casado,* 721 F.2d 1281 (10th Cir. 1983); *American Booksellers Association* v. *Rendell,* 332 Pa. Super. 537, 481 A.2d 919 (1984).

that this Court has found permissible in such cases as *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *Renton, supra*. In *Renton*, this Court upheld a City zoning ordinance prohibiting an adult motion picture theatre from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school, by finding that the purpose of passage of the zoning ordinance had been designed to combat the "undesirable secondary effects" that such businesses might have, such as contribution to neighborhood blight. *Renton, supra*, at 47, 51. Rather than a local zoning ordinance directed at "secondary effects," the statute in question here is a state-wide criminal statute, the passage of which fails to contain any legislative history or preamble asserting any overriding state interest or purpose.

Finally, as the questioned statute is not a zoning ordinance directed at harmful secondary effects, this statute cannot be considered or evaluated as, or similar to a reasonable "time, place or manner" regulation (and thus by a lower level of scrutiny), as such matters must, to pass constitutional muster in the first analysis, be content-neutral. *Ward* v. *Rock Against Racism*, 491 U.S. ___, 105 L.Ed.2d 661, 675, 680 (1989); *Clark* v. *Community For Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Mosley, supra*, at 99. The statute in question is content-specific, particularly directed at material containing specific depictions statutorily deemed to be "harmful to minors."

The dangers to this nation's constitutional freedoms of such a standard as exists here cannot be overemphasized. If this statute is allowed to stand, States will be free to relegate the adult public to access to material based upon a standard of what is fit for children. By this statute, the distribution to adults of, for

example, medical textbooks, books regarding breast feeding of infants, *Cosmopolitan* magazine, and even *National Geographics* is criminal conduct, if the place of sale or display is in close proximity to a church or school.

A state must simply not be allowed to criminalize materials sold or displayed to adults, on the basis that material might be harmful to minors, when such materials are not accessible to minors. Without a requirement that such materials be accessible to minors, the protections afforded by this Courts' decision in *Butler* become meaningless.

As the effect of I.C. § 35-49-3-3(3) is to prohibit constitutionally protected speech and conduct, and is not necessary to a compelling state interest (as the protection of minors is adequately addressed by I.C. §§ 35-49-3-3(1) and (2) — with I.C. § 35-49-3-3(3) adding no further protection) it is impermissibly overbroad, both facially and as applied in this action. *City Council for the City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 796-801 (1984); *Grayned, supra*, at 114-115; *Widmar, supra*. In words of Justice Frankfurter, the State of Indiana is attempting to "burn the house to roast the pig." *Butler, supra*, at 380.[9]

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[9] While this issue was presented to the Indiana Court of Appeals as Petitioner's "lead" argument, that court never actually addressed the constitutionality of I.C. § 35-49-3-3(3) or its use as a predicate offense for a RICO charge, but, rather, summarily concluded that the Indiana RICO Statute, predicated upon violations of the "Obscenity Statute," was constitutional in that such issues had been raised and rejected in *4447 Corp.* v. *Goldsmith*, 504 N.E.2d 559 (Ind. 1987) and *State* v. *Sappenfield*, 505 N.E.2d 504 (Ind. App. 1987), trans. denied. See 530 N.E.2d at 752. However, neither *4447 Corp.* nor *Sappenfield* either raised, discussed, or considered the constitutionality of I.C. § 35-49-3-3(3), nor its use as a basis for a RICO conviction. Neither was this specific issue raised or addressed by this Court's consideration of those matters in *Fort*

(*concluded on page 15*)

## II.

**I.C. § 35-49-3-3(3) VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION UNDER THE DIRECT HOLDINGS OF *LEMON* v. *KURTZMAN*, 403 U.S. 602 (1971) AND *LARKIN* v. *GRENDEL'S DEN, INC.*, 459 U.S. 116 (1982).**

Without any requirement that a "church" be pre-existing, I.C. § 35-49-3-3(3) would allow any individual or business dealing in matter deemed "harmful to minors" to be subject to criminal prosecution, simply by the act of a church establishing itself within 500 feet of a facility dealing in these types of material. Thus, this statute not only violates the "establishment clause" of the First Amendment of the United States Constitution by improperly affecting the establishment of religion, but it also impermissibly delegates to a church the ability to criminalize conduct that otherwise was (and continues to be, pursuant to *Butler, supra*) constitutionally protected, simply because it

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(*continued from page 14*)

*Wayne Books, supra*. In fact, it appears that at least three Justices acknowledged the potential discrepancy of predicating a RICO conviction upon dissemination or display of materials that may be deemed "harmful to minors," as opposed to materials that were, in fact, *obscene*, as Justice Stevens noted, when discussing the listing of penal violations that could statutorily serve as a basis of a RICO conviction:

> "This enumeration of predicate offenses inexplicably omits a parenthetical description of Ind Code Section 35-49-3. That latter statute is Indiana's current obscenity law, which makes it a misdemeanor to disseminate or distribute matter that is obscene or harmful to minors, or to present a performance that is obscene or harmful to minors." *Fort Wayne Books*, 103 L.Ed.2d at 58, fn. 8, Stevens J., Concurring in part.

Therefore, this Court may wish, as an alternative to granting certiorari in this matter, to remand this action back to the Indiana Courts to specifically address the constitutional issues raised by Petitioner regarding I.C. § 35-49-3-3(3) and its use as a predicate act to a RICO charge.

locates within 500 feet. Such a delegation of authority is impermissible under the establishment clause of the First Amendment.

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court announced a tri-partite test for establishment clause cases:

> "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion'." *Id.*, at 612-613.

In applying this test, this Court, in *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1981), held unconstitutional a state statute giving churches discretionary power to veto liquor license applications of premises located within 500 feet of a church. This Court specifically held that the statute (which effectively delegated zoning powers to churches), failed both the "primary effect" and "excessive entanglement" tests of *Lemon*, adding that the ". . . government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government . . . ." *Larkin, supra* at 307.

Like the statute struck down in *Larkin*, the Indiana statute here, due to the absence of any "grandfather" provisions, effectively delegates unconstitutional powers to a church, which is exercised by making a choice to rent or purchase a location for its services (for whatever length of time), thereby making illegal the sale of otherwise constitutionally protected material within 500 feet of its nearest property line, regardless of the length of time such a business had previously been in existence. Such a delegation is obviously fraught

with the dangers that the powers will be used to suppress speech protected by the First Amendment. In addition, as to businesses affected by the statute, the statute impermissibly grants a preference to churches and, at a minimum, violates the second prong of the *Lemon* test, that of having a principal or primary effect that neither advances nor inhibits religion.

I.C. § 35-49-3-3(3) also violates the precept against excessive entanglement, as the government, pursuant to this statute, becomes compelled to prosecute the sale and display of otherwise protected materials, on the sole basis of the location or relocation of a church. In fact, to properly enforce this statute, the State would be compelled to track the relocation of all churches, and then conduct area "sweeps" to ensure that no materials "harmful to minors" were nearby. I.C. § 35-49-3-3(3), thus, cannot withstand scrutiny under an establishment clause analysis.

## III.

**I.C. § 35-49-3-3(3) UNCONSTITUTIONALLY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY ESTABLISHING AN ARBITRARY CLASS FOR CRIMINAL PUNISHMENT, THAT BEING THOSE BUSINESSES OR INDIVIDUALS WHO SELL OR DISPLAY NON-OBSCENE, AND THUS CONSTITUTIONALLY PROTECTED, MATERIALS WITHIN 500 FEET OF A CHURCH OR SCHOOL, WHILE ARBITRARILY EXCLUDING FROM CRIMINAL PROSCRIPTION, CERTAIN SCHOOLS, MUSEUMS, AND LIBRARIES.**

I.C. § 35-49-3-3(3), both on its face, and as applied, violates Petitioner's equal protection rights under the Fourteenth Amendment to the United States Constitution. "Equal protection" is essentially a command that

all persons similarly situated should be treated alike. *City of Cleburne, Texas* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). There were no allegations by the State nor findings by the trial court that the films here in question were obscene as to adults (under the applicable Indiana Statute or as incorporated into the RICO Act). Therefore the materials are presumed to enjoy First Amendment protections. *Schad, supra*, at 65-66, and cases cited therein. Here, the State of Indiana seeks to regulate and criminalize the conduct of certain businesses or individuals who sell or display for sale this constitutionally-protected material (simply on the basis that, due to the establishment's proximity to a church or school, the non-obscene matter that it sells or displays only to adults may then be mechanistically deemed "harmful to minors"), while arbitrarily excluding others from the sweep of the statute's criminal sanctions.

I.C. § 35-49-3-4 sets up an exception to the criminal proscriptions contained within the Indiana "Obscenity" Statutes, including I.C. § 35-49-3-3, for any "bona fide school, museum, or public library" that qualifies for certain property exemptions, and for the employees of those institutions. Such an arbitrary classification violates Petitioners equal protection rights under the Fourteenth Amendment. *American Booksellers Association Inc.*, v. *Webb, supra*, at 1555-1556 (1986); *Wheeler* v. *State*, 380 A.2d 1052, 1061 (Md. 1977); *Tattered Cover, supra*, at 786. See also *Mosley, supra*, holding unconstitutional on equal protection grounds, a statute prohibiting picketing within 150 feet of a school, but exempting labor picketing from this exclusion.

The exclusion violates the fundamental principle that the government may not grant the use of a forum to people whose views it finds acceptable (here, certain schools, museums, and libraries), while denying the use

of that forum to those with less favored status (apparently, such as Petitioner). *Mosley, supra,* at 96.

Statutes setting up a classification which discriminate against some on the basis of the content and nature of the speech itself are subject to strict scrutiny, *Cleburne, supra,* at 440, and will be sustained only if it is necessary to a compelling state interest. *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621 (1969). Simply put, this Court has previously directed that regulations which restrict First Amendment Rights must be "precisely drawn means" supported by a compelling state interest. *Consolidated Edison Company* v. *Public Service Commission,* 447 U.S. 530, 540 (1979). Under this standard of review, I.C. § 35-49-3-3(3) cannot withstand constitutional scrutiny.

If the real goal of this discriminatory statutory provision is to restrict minors from access or exposure to matters "harmful" to them, then the 500 foot requirement is not necessary. A mere prohibition of the sale or display of these materials to minors would be sufficient. The distance of 500 feet does no more to restrict access by minors to these materials than would 200 feet, or 1200 feet, or even 2 miles. The "goal" of restricting the access to minors of these types of materials can be accomplished through means far less offensive to basic constitutional principals. *Indeed, subsections (1),(2),(4) and (5) of I.C. § 35-49-3-3 contain such specific statutory prohibitions precluding the sale or display of any material deemed "harmful to minors" either directly to minors or in areas that minors could have access.*

**The obvious purpose of these sections is to limit actual perceptual access to matter "harmful" to children by keeping the matter in areas where minors are denied access. Preventing direct visual, auditory or**

physical access to the materials is the proper and only effective means necessary to promote the State's interest. Placing an additional discriminatory restriction precluding the sale of such materials within 500 feet of a school or church adds nothing to the effectiveness of the statute, discriminates against establishments which sell or display sexually oriented materials merely on the basis of their proximity to a church or school, while arbitrarily allowing the same conduct by certain schools, museums and libraries, and unduly burdens the overall access of these materials to adults. Such a restriction and discrimination is not only unnecessary to the promotion of the states interest, but is constitutionally impermissible, and must be struck down.[10]

## IV.

**THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S MOTION TO DISMISS AMENDED INDICTMENT FOR LACK OF JURISDICTION, AS PETITIONER WAS CHARGED ON AN AMENDED INDICTMENT THAT WAS NEVER SUBMITTED TO A GRAND JURY FOR CONSIDERATION.**

The amended Indictment (Appendix F) in this action commences as follows:

> "The State of Indiana, Vandenburg County, ss:
>
> "The Grand Jurors for the County of Vandenburg in the State of Indiana, upon their oath, present and charge that: . . ."

Page three of that Indictment is signed by the prosecuting attorney, Robert Pigman, and page four is also

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[10] As noted above, the statute does not even require the church or school to have minors in attendance, and, for this reason, similarly exemplifies that I.C. § 35-49-3-3(3) is not necessary to a compelling governmental interest.

signed by Mr. Pigman, with the word "foreman" having a line drawn through it. The name and signature of the purported foreman does not appear on the amended Indictment, nor does the signature of five members of the Grand Jury appear.

Thus, the State was endeavoring to try Petitioner on a purported indictment that was never submitted to a Grand Jury, either at the time of the original convening of the Grand Jury returning the Indictment, nor during any concurrently instituted Grand Jury. The prosecuting attorney, as such, is totally without authority to institute the Grand Jury Indictment without the approval of the Grand Jury, and the amended Indictment filed in this case is insufficient to invoke the jurisdiction of the Indiana Courts. I.C. § 35-34-1-2(b)(1) dictates that an indictment shall be signed by "the foreman or five members of the Grand Jury . . . ." This requirement is also contained in I.C. § 35-34-2-12(b), which further requires, for an indictment to be valid, that it must be endorsed with the phrase "a true bill."

In this action, the prosecuting attorney was faced with the dilemma of having an insufficient indictment (not indicating that petitioner had acted "knowingly"), and the fact that the Grand Jury that had endorsed the original Indictment had been discharged. No attempt was made to submit the amended Indictment for consideration and action by any Grand Jury that was currently impaneled at the time. No statute of the State of Indiana or case holding permits a prosecuting attorney to proceed with trial in a criminal case on an indictment in the absent of submission of that indictment to the Grand Jury.

The Indiana Supreme Court has addressed this circumstance in *Walker* v. *State*, 251 Ind. 432 (1968), where the prosecuting attorney, without referring the

cause to a Grand Jury, caused to be filed an instrument designated as "amended indictment for a murder-shooting." There, as here, such instrument did not contain any jurat or purport to have been sworn to. The Indiana Supreme Court noted, in reversing the conviction, that the motion to quash the indictment should have been granted due to the absence of the foreman's signature and, as a result thereof, the conviction was a nullity as the trial court had lacked jurisdiction to proceed upon the unsigned indictment.

In addition to the failure of the appropriate members of the Grand Jury or the Grand Jury foreman to sign the amended Indictment, the amended Indictment is also invalid for the reason that it failed to be endorsed with the phrase "a true bill" as required by I.C. § 35-34-2-12(b)(2). An indictment which is not endorsed "a true bill" is defective upon its face. *Cooper* v. *State*, 79 Ind. 206 (1881); *Denton* v. *State*, 155 Ind. 307 (1900).

Since Petitioner was charged by way of indictment, the protections afforded by the Fifth Amendment to the United States Constitution apply. This Court is consistently held that the Fifth Amendment is violated when a criminal defendant is tried for a crime that is *broader* than is set forth in the indictment, and that an indictment may not be amended except by resubmission to a grand jury. See, for example, *Stirone* v. *United States*, 361 U.S. 212 (1960); *United States* v. *Miller*, 471 U.S. 130 (1985); *United States* v. *Norris*, 281 U.S. 619 (1930). As the requisite "scienter" is necessary in an obscenity prosecution, see, for example, *Hamling* v. *United States*, 418 U.S. 87 (1974), the original Indictment failing to contain such a finding, and the amended Indictment not having been submitted to a grand jury, Petitioner's Constitutional rights to be tried upon an adequate and proper indictment have been prejudicially

denied. Because of these defects, the trial court lacked jurisdiction to proceed to trial, and the judgment and conviction should, therefore, have been reversed.

## CONCLUSION

For all of the reasons noted above, the dangers to free and uninhibited speech and expression posed by I.C. § 35-49-3-3(3), and its use as a predicate offense for a RICO charge, are of such a magnitude that require review by this Court to end this serious threat to constitutional liberties.

Respectfully submitted,

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*Co-Counsel for Petitioner*

**DATED: November 16, 1989**

# APPENDICES TO PETITION FOR CERTIORARI

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## APPENDIX A

### DENIAL OF TRANSFER

(State of Indiana — Supreme Court)

(Entered September 21, 1989)

(STUDIO ART THEATRE OF EVANSVILLE, INC., v. STATE OF INDIANA — Cause Number 82A01-8805-CR-00152; LOWER CAUSE #5436)

You are hereby notified that the SUPREME COURT has on this day [9/21/89]

APPELLANT'S PETITION TO TRANSFER
IS HEREBY DENIED WITHOUT OPINION.
RANDALL T. SHEPARD, CHIEF JUSTICE

SHEPARD, C.J. AND DEBRULER
VOTE TO GRANT TRANSFER

(*Certification Omitted*)

# APPENDIX B

## OPINION

***REPORTED AT 530 N.E.2D 750 (IND.APP. 1 DIST. 1988)***

(State of Indiana — Court of Appeals — First District)

(Entered November 22, 1988)
(Rehearing Denied January 31, 1989)

(STUDIO ART THEATRE OF EVANSVILLE, INC., Defendant-Appellant, v. STATE of Indiana, Plaintiff-Appellee — No. 82A01-8805-CR-152)

NEAL, Judge.

*STATEMENT OF THE CASE*

Defendant-appellant, Studio Art Theatre of Evansville, Inc. (Studio Art), appeals its conviction under the Indiana Racketeer Influenced & Corrupt Organizations Act (RICO), IND.CODE 35-45-6-2(a)(3).

We affirm.

*STATEMENT OF THE FACTS*

Studio Art was charged by amended indictment with 19 specifications of violation of the Indiana RICO statute, IND.CODE 35-45-6-2, all of which, except specifications 12, through 15, were dismissed. Those remaining specifications charge Studio Art as follows:

> (12) did on December 17, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Teenage Runaway" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School

and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(13) did on December 19, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: "Seduction of Lana Shore" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(14) did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Boys in a Bath", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, 35-49-3-3(3).

(15) did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Guishe's Slave", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

*Record* at 138-139.

IND.CODE 35-45-6-2(a) states:

A person:

(1) **Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests these proceeds**

or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony.

The RICO charge was predicated upon IND.CODE 35-49-3-3 which reads as follows:

A person who knowingly or intentionally:

(1) Disseminates matter to minors that is harmful to minors;

(2) Displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(3) Sells or displays for sale to any person matter that is harmful to minors within five hundred feet [500'] of the nearest property line of a school or church;

(4) Engages in or conducts a performance before minors that is harmful to minors;

(5) Engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical

access, unless each minor is accompanied by his parent or guardian;

(6) Misrepresents his age for the purpose of obtaining admission to an area from which minors are restricted because of the display of matter or a performance that is harmful to minors; or

(7) Misrepresents that he is a parent or guardian of a minor for the purpose of obtaining admission of the minor to an area where minors are being restricted because of display of matter or performance that is harmful to minors;

commits a class A misdemeanor

Upon stipulated facts the trial court found that Studio Art knowingly had in its possession and displayed for sale the video cassette films set forth in specifications 12 through 15, and that the films depicted sexual conduct, nudity, and sexual excitement. The trial court found that the films were offered for sale within 500 feet of the churches and schools charged in the indictment in violation of IND.CODE 35-49-3-3(3), supporting the RICO charge.

*ISSUES*

On appeal the appellant claims numerous errors, which we restate as follows:

I. Whether the RICO statute is unconstitutional

II. Whether the trial court lacked jurisdiction because the amended indictment was not resubmitted to the grand jury.

III. Whether the trial court erred in interpreting IND.CODE 35-49-3-3(3) regarding the method of measuring the 500 foot distance set forth therein.

*DISCUSSION AND DECISION*

ISSUE I: *Constitutionality*

Studio Art argues on a broad front that IND.CODE 35-45-6-2 and IND.CODE 35-49-3-3 are unconstitutional. Studio Art claims that these statutes violate its rights under the first, fifth, and fourteenth amendments of the United States Constitution and art. I § 9 of the Indiana Constitution. It claims that the statutes are overbroad, vague, violate equal protection, and amount to the taking of its property without just compensation. It concludes with the claim that the statutes have an impermissible chilling effect on its first amendment rights.

The cases of *4447 Corp.* v. *Goldsmith* (1987), Inc., 504 N.E.2d 559; and *State* v. *Sappenfield* (1987), Ind.App., 505 N.E.2d 504, *trans. denied*, concerned the relation of the State's obscenity statute, IND.CODE 35-49-1-1 to -3-4, to the RICO statute. Those cases held that the RICO statute is not unconstitutional as applied to the obscenity statute. A petition for certiorari on *4447 Corp.* is currently pending in the Supreme Court of the United States. Discussion in those cases specifically addressed the first and fourteenth amendments and the argument made that the statutes were unconstitutionally vague. The same arguments are presented here, and in addition thereto, other remote constitutional arguments are presented which hinge on first and fourteenth amendment rights.

Because these matters have been presented to and ruled upon by our supreme court, we do not deem it

necessary to discuss them further. If the reader so desires, he is directed to those cases for further edification.

ISSUE II: *Amended Indictment*

The original indictment, signed by the grand jury foreman and the prosecuting attorney reads in part:

> The Grand Jurors for the County of Vandenburgh and State of Indiana, upon their Oaths, present and charge that:
>
> World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management, Inc.
> Studio Art Theatre of Evansville, Inc.
> A. M. W. Investments, Inc. and William Montrose
>
> BETWEEN 11-11-85 and 2-11-86 BEING ASSOCIATED WITH AN ENTERPRISE; TO-WIT: THE STUDIO ART THEATRE OF EVANSVILLE INC. DID PARTICIPATE IN THE ACTIVITIES OF THAT ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY, TO-WIT:
>
> (1) did knowingly exhibit to Larry Cannon on November 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

*Record* at 33. There followed 28 more specifications utilizing a format similar to that set forth in specification number one. The trial court permitted the State to amend the indictment to insert the word "knowingly" in the indictment as follows:

> The Grand Jurors for the County of Vandenburgh and State of Indiana, upon their Oaths, present and charge that:

World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management, Inc.
Studio Art Theatre of Evansville, Inc.
A. M. W. Investments, Inc. and William Montrose

BETWEEN 11-11-85 and 2-11-86 BEING ASSOCIATED WITH AN ENTERPRISE; TO-WIT: THE STUDIO ART THEATRE OF EVANSVILLE INC. DID *KNOWINGLY* PARTICIPATE IN THE ACTIVITIES OF THAT ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY, TO-WIT:

(1) did knowingly exhibit to Larry Cannon on November 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2. (Our emphasis.)

*Record* at 137.

The amended indictment, which included only 19 specifications, was not resubmitted to the grand jury but was signed only by the prosecuting attorney. Before final disposition, the amended indictment was dismissed as to all defendants except Studio Art, and eventually, all specifications except 12 through 15 were dismissed as to it. Studio Art moved to dismiss the amended indictment on the grounds that the grand jury had been discharged and had not acted upon it. Denial of that motion is assigned as error.

IND.CODE 35-34-1-5 governing amendments reads as follows:

> (a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:

(1) Any miswriting, misspelling, or grammatical error;

(2) Any misjoinder of parties defendant or offenses charged;

(3) The presence of any unnecessary repugnant allegation;

(4) The failure to negate any exception, excuse, or provision contained in the statute defining the offense;

(5) The use of alternative or disjunctive allegations as to the acts, means, intents, or results charged;

(6) Any mistake in the name of the court or county in the title of the action, or the statutory provision alleged to have been violated;

(7) The failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense;

(8) The failure to state an amount of value or price of any matter where that value or price is not of the essence of the offense; or

(9) Any other defect which does not prejudice the substantial rights of the defendant.

(b) The indictment or information may be amended in matters of substance or form, and the names of the material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:

(1) Thirty [30] days if the defendant is charged with a felony; or

(2) Fifteen [15] days if the defendant is charged only with one or more misdemeanors;

before the omnibus date. When the information or indictment is amended, it shall be signed by the prosecuting attorney.

(c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

(d) Before amendment of any indictment or information other than amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

As seen, the State must establish that Studio Art knowingly engaged in the conduct proscribed under the RICO statute. While the original indictment omitted the word knowingly from the capitalized portion of the indictment, each specification used the word, indicating the element required by the statute. Thus, any defect is merely a choice of organization selected by the draftsman. It is one of form, not substance. If a defense

under the original indictment would be equally applicable to the indictment in its amended form, no substantial prejudice has occurred. *Graves* v. *State* (1986), Ind., 496 N.E.2d 383. *See also Pennington* v. *State* (1988), Ind., 523 N.E.2d 414.

Under IND.CODE 35-34-1-5(a) an indictment may be amended on motion by the prosecuting attorney at any time because of any immaterial defect for:

> (5) the use of alternative or disjunctive allegations as to the acts, means, *intents*, or results charged.
>
> * * *
>
> (9) any other defect which does not prejudice the substantial rights of the defendant. [Our emphasis.]

That section does not state a requirement that the amended indictment be resubmitted to the grand jury. In fact, under paragraph (b) it is stated that when the indictment is amended it shall be signed by the prosecuting attorney. Further, under paragraph (b) the indictment may be amended as to substance, and even an amendment of that nature does not require resubmission to the grand jury. Clearly then, under paragraph (a) which addresses immaterial defects and permits amendments to be made at any time, even during trial, the legislature has not evidenced an intent that it desires that this case be resubmitted to the grand jury. Such action would be patently impractical. Accordingly, in *McCloud* v. *State* (1983), Ind.App., 452 N.E.2d 1053, an unsigned amendment information filed during a trial was held to be valid.

Studio Art relies primarily on *Walker* v. *State* (1968), 251 Ind. 432, 241 N.E.2d 792. In that case, the

defendant was charged with murder, which could be brought only by a grand jury indictment. The trial court sustained a motion to quash the original indictment. At that time, Burns Indiana Statutes 9-113, then in effect, required in such instance that the case be resubmitted to the grand jury for further action. It was not, and our supreme court held that such failure to follow the statute was fatal, preventing the trial court from acquiring jurisdiction. *Walker* is not authority here for the charge is not murder, and the controlling statute does not require that the indictment be resubmitted to the grand jury.

ISSUE III: *Method of Measuring Distance*

Finally, Studio Art argues the trial court erred in construing IND.CODE 35-49-3-3(3) regarding the method of measuring the distance between a place selling matter harmful to minors and a "school or church." It seems to argue that the proper method to determine the distance would be to measure the walking distance along the streets between each location. In *Taylor Drug Stores, Inc.* v. *Indiana Alcoholic Beverage Commission* (1986), Ind.App., 497 N.E.2d 932, where the statutory proscription was directed at the sale of liquor within 200 feet of a church, we held that straight-line measurement was the appropriate method of determining the distance between two points. The policy in the alcoholic beverage statute and the policy here is identical. We hold that *Taylor* controls. The trial court correctly applied the statute.

For the above reasons, this cause is affirmed.

JUDGMENT AFFIRMED.

RATLIFF, C.J., and CONOVER, P.J., concur.

# APPENDIX C

## RELEVANT U.S. CONSTITUTIONAL PROVISIONS AND INDIANA STATUTES

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### *UNITED STATES CONSTITUTION*

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

AMENDMENT XIV

Section 1. No state shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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### *INDIANA STATUTES*

**34-4-30.5-3. Action by prosecuting attorney for forfeiture of property — Orders. —**

(a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of,

intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation if IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

* * *

**35-34-1-2. Form of charge. —**

* * *

(b) An indictment shall be signed by:

(1) The foreman or five [5] members of the grand jury; and

(2) The prosecuting attorney or his deputy.

* * *

**35-34-1-4. Motion to dismiss — Grounds — Time of making motion — Action by court — Effect of dismissal. —**

(a) The court may, upon motion of the defendant, dismiss the indictment or information upon any of the following grounds:

* * *

(10) There exists some jurisdictional impediment to conviction of the defendant for the offense charged.

* * *

**35-34-2-12. Indictment — Requirements — Validity. —**

* * *

(b) Before an indictment is valid, at least five (5) grand jurors must concur in the finding of the indictment, and it must be:

(1) Signed by the prosecuting attorney or his deputy;

(2) Endorsed with the phrase "a true bill"; and

(3) Signed by the foreman of the grand jury or five (5) members of the grand jury.

* * *

**35-45-5-1-. Definitions.** — As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) Sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) Union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice,

victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern or racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five [5] years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting . . . .

* * *

**35-45-6-2. Corrupt business influence — Penalty. —**

(a) A person:

(1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony. [IC 35-45-6-2, as added by Acts 1980, P.L. 199, § 2.]

**35-49-2-2. Matter or performance harmful to minors. —**

A matter or performance is harmful to minors for purposes of this article if:

(1) It describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;

(2) Considered as a whole, it appeals to the prurient interest in sex of minors;

(3) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and

(4) Considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors. [IC 35-49-2-2, as added by P.L. 311-1983, § 33.]

**35-49-3-1. Importation or distribution of obscene matter. —**

A person who knowingly or intentionally:

(1) Sends or brings into Indiana obscene matter for sale or distribution; or

(2) Offers to distribute, distributes, or exhibits to another person obscene matter;

**commits a class A misdemeanor. However, the offense is a class D felony if the obscene matter depicts or describes sexual conduct involving any person who is or appears to be under sixteen [16] years of age. [IC 35-49-3-1, as added by P.L. 311-1983, § 33.]**

**35-49-3-3. Providing obscene matter and performances before minors. —**

A person who knowingly or intentionally:

(1) Disseminates matter to minors that is harmful to minors;

(2) Displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(3) Sells or displays for sale to any person matter that is harmful to minors within five hundred feet [500'] of the nearest property line of a school or church;

(4) Engages in or conducts a performance before minors that is harmful to minors;

(5) Engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

* * *

commits a class A misdemeanor. [IC 35-49-3-3, as added by P.L. 311-1983, § 33.]

**35-49-3-4. Defenses. —**

It is a defense to a prosecution under section 3 [35-49-3-3] of this chapter for the defendant to show:

* * *

(2) That the matter was disseminated or displayed to or that the performance was performed before the recipient by a bona fide school,

museum, or public library that qualifies for certain property tax exemptions under IC 6-1.1-10, or by an employee of such a school, museum, or public library acting within the scope of his employment;

* * *

**35-50-2-6. Class C felony. —**

A person who commits a class C felony shall be imprisoned for a fixed term of five [5] years, with not more than three [3] years added for aggravating circumstances or not more than three [3] years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars [$10,000]. [IC 35-50-2-6, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 119.]

**35-50-3-2. Class A misdemeanor. —**

A person who commits a class A misdemeanor shall be imprisoned for a fixed term of not more than one [1] year; in addition, he may be fined not more than five thousand dollars [$5,000]. [IC 35-50-3-2, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 124.]

## APPENDIX D

### INDICTMENT FOR: CORRUPT BUSINESS INFLUENCE

(State of Indiana — County of Vanderburgh — Circuit Court — 1986 Term)

(Filed April 29, 1986)

(STATE OF INDIANA vs WORLD WIDE BUSINESS MANAGEMENT AND CONSULTANTS, INC. D/B/A WORLD WIDE BUSINESS MANAGEMENT INC., STUDIO ART THEATRE OF EVANSVILLE, INC., A.M.W. INVESTMENTS, INC. AND WILLIAM MONTROSE — CAUSE NO. 5436)

The State of Indiana, Vanderburgh County, ss:

The Grand Jurors for the County of Vanderburgh and State of Indiana, upon their Oaths, present and charge that:

World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management Inc.
Studio Art Theatre of Evansville, Inc.
A.M.W. Investments, Inc. and William Montrose

BETWEEN 11-11-85 AND 2-11-86 BEING ASSOCIATED WITH AN ENTERPRISE; TO-WIT: THE STUDIO ART THEATRE OF EVANSVILLE INC. DID PARTICIPATE IN THE ACTIVITIES OF THAT ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY, TO-WIT:

(1) did knowingly exhibit to Larry Cannon on November 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(2) did knowingly exhibit to Larry Cannon on November 18, 1985 an obscene performance, to-wit: an

act of female masturbation, all in violation of I.C. 35-49-3-2.

(3) did knowingly exhibit to Larry Cannon on November 25, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(4) did knowingly exhibit to Larry Cannon on November 27, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(5) did knowingly exhibit to Larry Cannon on December 13, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(6) did knowingly exhibit to Larry Cannon on December 16, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(7) did knowingly exhibit to Larry Cannon on February 11, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(8) did knowingly exhibit to David Davies on December 19, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(9) did knowingly exhibit to Gerald Wingerter on November 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(10) did knowingly exhibit to Gerald Wingerter on February 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(11) did knowingly exhibit to Roy Pace on December 19, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(12) did knowingly exhibit to Randy Eades on December 13, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(13) did knowingly exhibit to Tom Wallis on December 20, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(14) did knowingly exhibit to Rodney Buchanan on December 20, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(15) did knowingly exhibit to Bertha Weekley on February 10, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(16) did knowingly exhibit to Nancy Davis on February 10, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(17) did knowingly exhibit to Joyce Below on February 10, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(18) did on December 17, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Teenage Runaway" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(19) did on December 19, 1985 knowingly display for

sale to any person matter that is harmful to minors, to-wit: the movie "Seduction of Lana Shore" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(20) did on December 30, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Camp Beaver Lay" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(21) did on January 6, 1986 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Dance Fever" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(22) did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Boys in a Bath", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-45-3-3(3).

(23) did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Guishe's Slave", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-45-3-3(3).

(24) did on December 17, 1985 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Teenage Runaway", all in violation of I.C. 35-49-3-1(2).

(25) did on December 19, 1985 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Seduction of Lana Shore", all in violation of I.C. 35-49-3-1(2).

(26) did on December 30, 1985 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Camp Beaver Lay", all in violation of I.C. 35-49-3-1(2).

(27) did on January 6, 1986 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Dance Fever", all in violation of I.C. 35-49-3-1(2).

(28) did on February 6, 1986 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Boys in a Bath", all in violation of I.C. 35-49-3-1(2).

(29) did on February 6, 1986 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Guisha's Slave", all in violation of I.C. 35-49-3-1(2).

AND ALL IN VIOLATION OF I.C. 35-45-6-2(a)(3)).

Contrary to the form of the statute, in such cases made and provided, and against the peace and dignity of the State of Indiana.

/s/ Robert J. Pigman
Prosecuting Attorney

CLASS: C Felony
PENALTY: 2-8 Years

D-6

*INDICTMENT FOR:*
*CORRUPT BUSINESS INFLUENCE*

A TRUE BILL

/s/ John N. Goode, Foreman

STATE'S WITNESSES:

GERALD WINGERTER, EPD
LARRY CANNON, EPD
DAVID DAVIES, EPD
RODNEY BUCHANAN, VCSD
TOM WALLIS, VCSD
RANDLE EADES, 1709 Herndon Drive
ROY PACE, 3501 Herndon Drive
WENDY TINSLEY
DIERDRE L. VIERRA
JOHN SARE
CARLISS WARTMAN
KATHY REED
JANNY FLANIGAN
JOYCE BELOW
BERTHA WEEKLEY
WILLIAM JEFFERS
KEEPER OF RECORDS, Southern Indiana Gas and Electric
KEEPER OF RECORDS, Evansville Water Department
KEEPER OF RECORDS, Indiana Bell, Evansville, Indiana
KEEPER OF RECORDS, Old National Bank

## APPENDIX E

### TRIAL COURT ORDER OF MARCH 27, 1987

(State of Indiana — County of Vanderburgh — Circuit Court)

(Dated March 27, 1987)

(STATE OF INDIANA vs STUDIO ART THEATRE WILLIAM MONTROSE — #5436)

FRIDAY, MARCH 27, 1987 CRIMINAL O.B. 107
VANDERBURGH CIRCUIT COURT

Comes now the Court and grants State's motion to Amend Indictment. Court denies defendant's motion to dismiss. Trial by jury affirmed for June 22, 1987.

STATE OF INDIANA
COUNTY OF VANDERBURGH
SS: IN THE VANDERBURGH CIRCUIT COURT

I, Betty Knight Smith, Clerk of the Vanderburgh Circuit Court, do hereby certify that the above is page 1 of a 1 page official document designated as a Order Book Entry, and is a full, complete and accurate copy of said Minute pertaining to Studio Art Theatre which is on file with and in the custody of my office in Order Book 107 on Page 289.

WITNESS, my hand and the seal of said Court this 7 day of November, 1989.

/s/ BETTY KNIGHT SMITH, CLERK
VANDERBURGH CIRCUIT COURT

By: /s/ Patricia Gilbert, Deputy
CIRCUIT COURT CLERK

# APPENDIX F

## AMENDED INDICTMENT FOR: CORRUPT BUSINESS INFLUENCE

(State of Indiana — County of Vanderburgh — Circuit Court — 1987 Term)

(Filed June 4, 1987)

(STATE OF INDIANA vs WORLD WIDE BUSINESS MANAGEMENT AND CONSULTANTS, INC. D/B/A WORLD WIDE BUSINESS MANAGEMENT INC., STUDIO ART THEATRE OF EVANSVILLE, INC., A.N.W. INVESTMENTS, INC. AND WILLIAM MONTROSE — CAUSE NO. 5436)

The State of Indiana, Vanderburgh County, ss:

The Grand Jurors for the County of Vanderburgh and State of Indiana, upon their Oaths, present and charge that:

World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management, Inc.
Studio Art Theatre of Evansville, Inc.
A.M.W. Investments, Inc. and William Montrose

BETWEEN 11-11-85 AND 2-11-86 BEING ASSOCIATED WITH AN ENTERPRISE, TO-WIT: THE STUDIO ART THEATRE OF EVANSVILLE, INC. DID KNOWINGLY PARTICIPATE IN THE ACTIVITIES OF THAT ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY, TO-WIT:

(1) did knowingly exhibit to Larry Cannon on November 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 39-45-3-2.

(2) did knowingly exhibit to Larry Cannon on November 18, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(3) did knowingly exhibit to Larry Cannon on February 11, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(4) did knowingly exhibit to David Davies on December 19, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(5) did knowingly exhibit to Gerald Wingerter on November 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(6) did knowingly exhibit to Gerald Wingerter on February 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(7) did knowingly exhibit to Tom Wallis on December 20, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(8) did knowingly exhibit to Rodney Buchanan on December 20, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(9) did knowingly exhibit to Bertha Weekley on February 10, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(10) did knowingly exhibit to Nancy Davis on February 10, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(11) did knowingly exhibit to Joyce Below on February 10, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(12) did on December 17, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Teenage Runaway" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(13) did on December 19, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: "Seduction of Lana Shore" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(14) did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Boys in a Bath", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, 35-49-3-3(3).

(15) did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Guishe's Slave", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(16) did on December 17, 1985 knowingly distribute to Gerald Wingerter obscene matter, to-wit: "Teenage Runaway", all in violation of I.C. 35-49-3-1(2).

(17) did on December 19, 1985 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Seduction of Lana Shore", all in violation of I.C. 35-49-3-1(2).

(18) did on February 6, 1986 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Boys in a Bath", all in violation of I.C. 35-49-3-1(2).

(19) did on February 6, 1986 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Guisha's Slave", all in violation of I.C. 35-49-3-1(2).

AND ALL IN VIOLATION OF I.C. 35-45-6-2(a)(3).

Contrary to the form of the statute, in such cases made and provided, and against the peace and dignity of the State of Indiana.

/s/ Robert J. Pigman
PROSECUTING ATTORNEY

CLASS: C Felony
PENALTY: 2-8 Years

WITNESSES ATTACHED

*AMENDED INDICTMENT FOR:*
*CORRUPT BUSINESS INFLUENCE*

/s/ Robert J. Pigman
~~Foreman~~

Gerald Wingerter, EPD
Larry Cannon, EPD
David Davies, EPD
William R. Jeffers, Vanderburgh County Surveyor's Office
Tom Wallis, VCSD
Rodney Buchanan, VCSD
Bertha Mae Weekley, EPD
Nancy Davis, EPD
Joyce Below, EPD

Jim Fanagan, SIGECO
John Love, Old National Bank of Evansville
420 Main Street
Jim McIntyre, City of Evansville Water Department
Civic Center Complex
Cathy Ann Reel
Corliss A. Waitman, 72 Herndon Drive
Diedre L. Vierra, 2128 S.E. Riverside
William Smothers, Studio Art Theatre of Evansville
Laurie Fitz, Box 110 East Hein Road, Chandler, IN
Edward Thomas 826 Madison
Kristine Holder, 501 Covert
Peggy Sue Fulkerson
John Crouch
Michael Whitney

# APPENDIX G

## TRIAL COURT ORDER OF JUNE 15, 1987

(State of Indiana — County of Vanderburgh — Circuit Court)

(Dated June 15, 1987)

(STATE OF INDIANA vs WORLD WIDE BUS. MGMT, ET AL — #5436)

MONDAY, JUNE 15, 1987 CRIMINAL O.B. 108
VANDERBURGH CIRCUIT COURT

State of Indiana by Robert Pigman, Prosecutor; defended by counsel, Lockyear and Kornblum. Hearing held on Motion to Dismiss filed by defendant. Motion to Dismiss as to Lack of Jurisdiction overruled. State given until June 17, 1987, at 1:30 p.m. to respond to Motion to Dismiss Amended Indictment.

Defendants Studio Art Theatre of Evansville, Inc., and William Montrose by council file Praecipe.

STATE OF INDIANA
COUNTY OF VANDERBURGH
SS: IN THE VANDERBURGH CIRCUIT COURT

I, Betty Knight Smith, Clerk of the Vanderburgh Circuit Court, do hereby certify that the above is page 1 of a 1 page official document designated as a Order Book Entry, and is a full, complete and accurate copy of said Minute pertaining to World Wide Bus. Mgmt. which is on file with and in the custody of my office in Order Book 108 on Page 300.

WITNESS, my hand and the seal of said Court this 7 day of November, 1989.

/s/ BETTY KNIGHT SMITH, CLERK
VANDERBURGH CIRCUIT COURT

By: /s/ Patricia Gilbert, Deputy
CIRCUIT COURT CLERK

# APPENDIX H

## STIPULATION OF FACTS

(State of Indiana — County of Vanderburgh — Circuit Court — 1987 Term)

(Filed October 29, 1987)

(STATE OF INDIANA vs WORLD WIDE BUSINESS MANAGEMENT AND CONSULTANTS, INC. D/B/A WORLD WIDE BUSINESS MANAGEMENT INC., STUDIO ART THEATRE OF EVANSVILLE, INC., A.M.W. INVESTMENTS, INC. AND WILLIAM MONTROSE — CAUSE NO. 5436)

Comes now the State of Indiana, by Prosecuting Attorney, Robert J. Pigman, and comes now the Studio Art Theatre of Evansville Inc. by their attorneys, Lee Klein and Theodore Lockyear, and hereby stipulate to the following set of facts for admission into evidence at the trial of this cause:

1. That the Studio Art Theatre of Evansville Inc. is an Indiana Corporation lawfully incorporated on September 18, 1978 pursuant to the Indiana General Corporation Act. That the Studio Art Theatre of Evansville Inc. has been incorporated to transact any and all lawful business for which corporations may be incorporated under the Indiana General Corporation Act since the date of September 18, 1978. That the Studio Art Theatre of Evansville Inc. has as its resident agent CT Corporation System, located at 101 Merchants Bank Building, Indianapolis, Indiana, 46204. That the President of the Studio Art Theatre of Evansville Inc. is William Montrose.

2. That the Studio Art Theatre of Evansville Inc. is the owner and operator of a retail adult entertainment

business, located at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana. That the Studio Art Theatre of Evansville Inc. was the owner and operator of said business on the 17th day of December, 1985, the 19th day of December, 1985, and the 6th day of February, 1986 and was between the periods of November 11, 1985 and February 11, 1986 engaged in the business of retail sales of sexually explicit and other materials.

3. That the Studio Art Theatre of Evansville Inc. did knowingly have in its possession and did knowingly display for sale to its retail adult customers at its business premises at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana, the video cassette film entitled *"Teenage Runaway"*. That this film was knowingly possessed and knowingly displayed for sale on December 17, 1985 and further that said video cassette film entitled *"Teenage Runaway"* was displayed for sale during the ordinary course of business of the Studio Art Theatre of Evansville Inc. as it was conducting its business activities on December 17, 1985.

4. That the Studio Art Theatre of Evansville Inc. did knowingly have in its possession and did knowingly display for sale to its retail adult customers at its business premises at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana the video cassette film entitled *"Seduction of Lana Shore"*. That said video cassette film entitled *"Seduction of Lana Shore"* was displayed for sale during the ordinary course of business of the Studio Art Theatre of Evansville Inc. as it was conducting its business activities on December 19, 1985.

5. That the films *"Seduction of Lana Shore"* and *"Teenage Runaway"* contain sexual conduct depictions

of nudity, sexual conduct and sexual excitement. That considered as a whole the film *"Teenage Runaway"* and *"Seduction of Lana Shore"* appeal to the prurient interest in sex of minors, that it is patently offensive to prevailing standards in the adult community with respect to what is suitable matter for minors and that considered as a whole, it lacks serious literary, artistic, political or scientifical value for minors.

6. That the Studio Art Theatre of Evansville Inc. did knowingly sell to Gerald Wingerter, an adult customer and an Evansville City Police Officer, a film entitled *"Boys in the Bath"* at its business premises, at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana on February 6, 1986. That the sale of said film *"Boys in the Bath"* was in the ordinary course of business of the Studio Art Theatre of Evansville Inc.

7. That the film *"Boys in the Bath"* contains sexual depictions of nudity, sexual conduct and sexual excitement. That considered as a whole, the film *"Boys in the Bath"* appeals to the prurient interest in sex of minors, that it is patently offensive to prevailing standards in the adult community with respect to what is suitable matter for minors and that considered as a whole it lacks serious literary, artistic, political or scientific value for minors.

8. That the Studio Art Theatre of Evansville Inc. did knowingly sell to Gerald Wingerter, an adult customer and a member of the Evansville Police Department, the film entitled *"Geisha's Slave"* during the ordinary course of business at its business premises 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana on February 6, 1986. That said film *"Geisha's Slave"* contains depictions of sexual

conduct, nudity, and sexual excitement. That taken as a whole it appeals to the prurient interest in sex of minors, that it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for minors and that considered as a whole the film *"Geisha's Slave"* lacks serious literary, artistic, political or scientific value for minors.

9. That the business premises of Studio Art Theatre of Evansville Inc. where the films *"Teenage Runaway"* and *"Seduction of Lana Shore"* were displayed and where the sale of the films *"Boys in the Bath"* and *"Geisha's Slave"* was made is located within five hundred feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church as that distance has been calculated using the method of calculation based upon the order of the Vanderburgh Circuit Court, the Honorable Judge William H. Miller, dated June 8, 1987. That based on that calculation the entire business premises of the Studio Art Theatre of Evansville Inc. is within five hundred feet of the closest property line of the aforesaid St. Boniface Catholic Church and St. Boniface Catholic School and was so located at all times relevant to these procedings. That the point within the business premise of said Studio Art Theatre of Evansville Inc. where the aforesaid films were displayed for sale and sold as aforesaid is within five hundred feet of the Simpson United Methodist Church as that distance has been calculated using the method of calculation based on the order of the Vanderburgh Circuit Court, the Honorable Judge William H. Miller, dated June 8, 1987.

10. That at the time and on the date of the display of the video cassette films entitled *"Teenage Runaway"* and *"The Seduction of Lana Shore"* and the sale of the video cassette films entitled *"Boys in the Bath"* and

*"Geisha's Slave"*, the business premises of the Studio Art Theatre of Evansville, Inc., where such transactions took place, was more than five hundred (500) feet from the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church measured from the front public entrance of the business premises to said school and churches using the calculations and measurements of distance of Sam Biggerstaff, a surveyor. That said measurements from Studio Art's front public entrance East along Franklin Street to 10th Avenue; thence North on 10th Avenue to the nearest property line of St. Boniface Catholic Church and St. Boniface Catholic School is 527 feet. That said measurements from Studio Art's front public entrance West along Franklin Street to 11th Avenue; thence South on 11th Avenue to the nearest property line of Simpson United Methodist Church is 615 feet.

11. That defendant's Exhibit 1 is to a scale plat drawing of the area surrounding the business premises of the Studio Art Theatre of Evansville, Inc., including the locations of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church. That said exhibit and the distances portrayed thereon from the business premises to points B and C are accurate and all relative locations, structures and property lines are to the scale set out therein. That the distance and relative locations of each item set out on said plat are present in the positions located thereon at all times relevant to these proceedings.

12. That defendant's Exhibit 1 is admissible into evidence without objection.

13. That the video cassette films entitled *"Teenage Runaway"*, marked State's exhibit 1 and *"Seduction of*

*Lana Shore"* marked State's exhibit 2, are the actual video cassette films which were displayed for sale by Studio Art Theatre of Evansville Inc. at its business premises at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana on December 17, 1985 and December 19, 1985. That the video cassette films entitled *"Boys in the Bath"* and *"Geisha's Slave"* marked State's exhibit 3 and 4 respectively are the actual video cassette films sold on February 6, 1986 to Gerald Wingerter at the business premises of the Studio Art Theatre of Evansville Inc. located at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana.

14. That State's exhibit 5 is an accurate copy of the quarter sheets which are official records of the City Engineers Office for the City of Evansville. That the pink area of said map is an accurate depiction of the location of the business premises of the Studio Art Theatre of Evansville Inc. That the smaller green area of said map marked Simpson U.M.C. accurately depicts the location of Simpson United Methodist Church and that the larger green area of said map marked St. Boniface Church accurately depicts the location of the St. Boniface Catholic Church and St. Boniface Catholic School with St. Boniface Catholic School occupying the western portion of said area and St. Boniface Catholic Church representing the eastern portion of said area. That said map is accurate in all of its relative locations, structures and property lines to the scale set out thereon. That the distances and relative locations of each item set out on said map were present in the positions indicated thereon for all times relevant to these proceedings.

15. That State's exhibit 1-5 are admissible into evidence without objection.

16. That St. Boniface Catholic School is a school for seventh and eighth grade school children which operates its school year from the Tuesday following Labor Day through the end of the first week of June for each school year. That St. Boniface Catholic Church is a church used for religious services by members of the Catholic faith. That Simpson United Methodist Church is a church used for religious services by members of the Methodist faith.

17. That the Studio Art Theatre of Evansville Inc. participated in all the aforesaid conduct involving the display of the films, *"Teenage Runaway"* and *"Seduction of Lana Shore"* and the sale of the films *"Boys in the Bath"* and *"Geisha's Slave"* knowingly and intentionally and during the ordinary course of its business on the dates herein stipulated.

18. All the activities stipulated to by the Studio Art Theatre of Evansville Inc. involving display for sale of the films *"Teenage Runaway"* and *"Seduction of Lana Shore"* and the sale of the films *"Boys in the Bath"* and *"Geisha's Slave"* were done inside the business premises of the Studio Art Theatre of Evansville Inc. at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana.

19. There is no allegation, issue or evidence presented in this case by the Amended Indictment that minors under the age of eighteen (18) were ever upon, had access to or otherwise could view the display of any material, books, magazines or films on the Business Premises of Studio Art from the exterior thereof, including but not limited to, the display of the video cassette films entitled *"Teenage Runaway"* and *"Seduction of Lana Shore"*. That the sale of the films *"Boys in the Bath"* and *"Geisha's Slave"* on February 6, 1986, to Gerald

Wingerter were sales to an adult customer of the Studio Art inside the business premises of the said Studio Art.

Respectfully submitted,

/s/ Robert J. Pigman
Prosecuting Attorney

/s/ Theodore Lockyear
Attorney for Studio Art Theatre
of Evansville Inc.

/s/ Lee Klein
Attorney for Studio Art Theatre
of Evansville Inc.

/s/ *William Montrose*
*President*
*Studio Art Theatre of*
*Evansville Inc.*

# APPENDIX I

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

(State of Indiana — County of Vanderburgh — Circuit Court — 1987 Term)

(STATE OF INDIANA vs WORLD WIDE BUSINESS MANAGEMENT & CONSULTANTS, INC. D/B/A WORLD WIDE BUSINESS MANAGEMENT, INC. STUDIO ART THEATRE OF EVANSVILLE, INC. A.M.W. INVESTMENTS, INC. WILLIAM MONTROSE — CAUSE NO. 5436)

### *FINDINGS OF FACT*

1. That on June 4, 1987, the State of Indiana, County of Vanderburgh, filed an Amended Indictment charging World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management, Inc., Studio Art Theatre of Evansville, Inc., A.M.W. Investments, Inc. and William Montrose with a violation of I.C. 35-45-6-2(a)(3) ("Corrupt Business Influence").

2. That the charged violation of I.C. 35-45-6-2(a)(3) was based upon nineteen (19) predicated acts prohibited by I.C. 35-49-3-3(3).

3. That on October 19, 1987, the State of Indiana, County of Vanderburgh, moved to dismiss the Amended Indictment against World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management, Inc., A.M.W. Investments, Inc. and William Montrose.

4. That on October 19, 1987, the Vanderburgh Circuit Court granted the motion to dismiss.

5. That on October 19, 1987, the State of Indiana, County of Vanderburgh, moved to dismiss all of the predicated acts with the exception of predicated acts twelve (12), thirteen (13), fourteen (14), and fifteen (15).

6. That on October 19, 1987, the Vanderburgh Circuit Court granted the motion to dismiss all of the predicated acts with the exception of predicated acts twelve (12), thirteen (13), fourteen (14), and fifteen (15).

7. That on October 19, 1987, Studio Art Theatre of Evansville, Inc. became the sole remaining defendant in this proceeding.

8. That on October 19, 1987, in the trial of this cause, the State of Indiana, County of Vanderburgh, filed a Stipulation of Facts, there being no objection by the defendant, said Stipulation was admitted into evidence.

9. That the Studio Art Theatre of Evansville, Inc. is an Indiana corporation lawfully incorporated on September 18, 1978 pursuant to the Indiana General Corporation Act.

10. That the Studio Art Theatre of Evansville, Inc. has been incorporated to transact any and all lawful business for which corporations may be incorporated under the Indiana General Corporation Act since the date of September 18, 1978.

11. That the Studio Art Theatre of Evansville, Inc. has as its resident agent CT Corporation System, located at 101 Merchants Bank Building, Indianapolis, Indiana, 46204.

12. That the President of the Studio Art Theatre of Evansville, Inc. is William Montrose.

13. That the Studio Art Theatre of Evansville, Inc. is the owner and operator of a retail adult entertainment

business, located at 2113 W. Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana.

14. That the Studio Art Theatre of Evansville, Inc. was the owner and operator of said business on the 17th day of December, 1985, the 19th day of December, 1985, and the 6th day of February, 1986, and was, between the periods of November 11, 1985 and February 11, 1986, engaged in the business of retail sales of sexually explicit and other materials.

15. That the Studio Art Theatre of Evansville, Inc. did knowingly have in its possession and did knowingly display for sale to its retail adult customers at its business premises at 2113 W. Franklin Street, in the City of Evansville, State of Indiana, the video cassette film entitled "Teenage Runaway".

16. That the film, "Teenage Runaway", was knowingly possessed and knowingly displayed for sale on December 17, 1985 during the ordinary course of business of the Studio Art Theatre of Evansville, Inc. as it was conducting its business activities on December 17, 1985.

17. That the Studio Art Theatre of Evansville, Inc. did knowingly have in its possession and did knowingly display for sale to its retail adult customers at its business premises at 2113 W. Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana, the video cassette film entitled "Seduction of Lana Shore".

18. That the film, "Seduction of Lana Shore" was knowingly possessed and was knowingly displayed for sale on December 19, 1985 during the ordinary course of business of the Studio Art Theatre of Evansville, Inc. as it was conducting its business activities on December 19, 1985.

19. That the Studio Art Theatre of Evansville, Inc. did knowingly sell to Gerald Wingerter, an adult customer and an Evansville City Police Officer, a film entitled "Boys In A Bath", at its business premises at 2113 W. Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana, on February 6, 1986, during the ordinary course of business.

20. That the Studio Art Theatre of Evansville, Inc. did knowingly sell to Gerald Wingerter, an adult customer and an Evansville City Police Officer, a film entitled "Geisha's Slave" at its business premises at 2113 W. Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana on February 6, 1986, during the ordinary course of business.

21. That the said films, "Teenage Runaway", "Seduction of Lana Shore", "Boys In A Bath" and "Geisha's Slave", contain depictions of sexual conduct, nudity, and sexual excitement.

22. That the United Methodist Church is located at 2201 W. Illinois, in the City of Evansville, County of Vanderburgh, State of Indiana.

23. That Simpson United Methodist Church is a church used for religious services by members of the Methodist faith.

24. That St. Boniface Catholic Church is located at 418 N. Wabash, in the City of Evansville, County of Vanderburgh, State of Indiana.

25. That St. Boniface Catholic Church is a church used for religious services by members of the Catholic faith.

26. That St. Boniface Catholic School is located at 2031 W. Michigan, in the City of Evansville, County of Vanderburgh, State of Indiana.

27. That St. Boniface Catholic School is a school for seventh and eighth grade school children which operates its school year from the Tuesday following Labor Day through the end of the first week of June for each school year.

28. That Simpson United Methodist Church, St. Boniface Catholic Church and St. Boniface Catholic School were so located at all times relevant to this proceeding.

29. That State's Exhibit 5 is an accurate copy of the quarter sheets which are official records of the City Engineers Office for the City of Evansville.

30. That the pink area of said map is an accurate depiction of the location of the business premises of the Studio Art Theatre of Evansville, Inc.

31. That the smaller green area of said map marked Simpson U.M.C. accurately depicts the location of Simpson United Methodist Church.

32. That the larger green area of said map marked St. Boniface Church accurately depicts the location of St. Boniface Catholic Church and St. Boniface Catholic School with St. Boniface Catholic School occupying the western portion of said area and St. Boniface Catholic Church representing the eastern portion of said area.

33. That said map is accurate in all its relative locations, structures and property lines to the scale set out thereon.

34. That the distances and relative locations of each item set out on said map were present in the positions indicated thereon for all times relevant to this proceeding.

35. That the State of Indiana, County of Vanderburgh, has charged by way of an Amended Indictment in four (4) counts, that Studio Art Theatres of Evansville, Inc. has violated I.C. 35-49-3-3(3), to-wit:

> A person who knowingly or intentionally:
>
> (3) sells or displays for sale to any person matter that is harmful to minors within five hundred feet (500') of the nearest property line of a school or church;
>
> commits a Class A misdemeanor.

36. That the above four (4) counts charged are as follows:

a. That the Studio Art Theatre of Evansville, Inc. did on December 17, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Teenage Runaway" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church, all in violation of I.C. 35-49-3-3(3).

b. That the Studio Art Theatre of Evansville, Inc. did on December 19, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Seduction of Lana Shore" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church, all in violation of I.C. 35-49-3-3(3).

c. That the Studio Art Theatre of Evansville, Inc. did on February 6, 1986 knowingly sell to

Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Boys In A Bath", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church, all in violation of I.C. 35-49-3-3(3).

d. That the Studio Art Theatre of Evansville, Inc. did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: "Geisha's Slave", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church, all in violation of I.C. 35-49-3-3(3).

37. That the State of Indiana, County of Vanderburgh, has charged by way of an Amended Indictment that the above four (4) counts are predicated acts twelve (12), thirteen (13), fourteen (14), and fifteen (15), respectively, all in violation of I.C. 35-45-6-2(a)(3), to-wit:

(a) A person:

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C Felony.

*CONCLUSIONS OF LAW*

1. **The law is with the State of Indiana and against the defendant.**

2. The Circuit Court of Vanderburgh County, State of Indiana, has jurisdiction in this matter.

3. Legislative acts are afforded a presumption of constitutionality, with the burden of rebutting that presumption upon the challenger with all reasonable doubts resolved in favor of the act's constitutionality. *Whitewater Valley Canoe* v. *Franklin County Commissioners* (Ind. App. 1 Dist. 1987), ___IN___, 507 N.E.2d 1001, 1004.

4. The films "Teenage Runaway", "Seduction of Lana Shore", "Boys In A Bath" and "Geisha's Slave" are obscene in that taking each as a whole they appeal to a minor's prurient interest in sex, are patently offensive to prevailing standards in the adult community with respect to what is suitable matter for minors and lack serious literary, artistic, political or scientific value for minors. *Miller* v. *California* (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419.

5. The Studio Art Theatre of Evansville, Inc. is guilty of four (4) counts of I.C. 35-49-3-3(3) in that the business premises of Studio Art Theatre of Evansville, Inc. where the films "Teenage Runaway" and "Seduction of Lana Shore" were displayed and where the sale of the films "Boys In A Bath" and "Geisha's Slave" were made is located within five hundred feet (500') of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church.

6. Indiana's Racketeer Influenced and Corrupt Organization Act, as it pertains to predicate offenses of obscenity, does not violate the First and Fourteenth Amendments to the United States Constitution. *4447 Corp.* v. *Goldsmith* (1987), ___IN___, 504 N.E.2d 559, 564.

7. Prior convictions for the predicate offenses are not required to sustain a conviction for corrupt business influence. *Id.* at 566.

8. The Studio Art Theatre of Evansville, Inc. is guilty of corrupt business influence, a violation of I.C. 35-45-6-2(a)(3).

/s/ William H. Miller, Judge
Vanderburgh Circuit Court

# APPENDIX J

## PETITION FOR REHEARING

(State of Indiana — Court of Appeals)

(STUDIO ART THEATRE OF EVANSVILLE, INC., Defendant-Appellant, -vs- STATE OF INDIANA, Plaintiff-Appellee — NO. 82A01-8805-CR-152; Appeal from the Vanderburgh Circuit Court; Cause No. Below 5436; The Honorable William H. Miller, Judge)

COMES NOW the Defendant-Appellant, Studio Art Theatre of Evansville, Inc., by counsel, Lee J. Klein and James A. Kornblum of the law firm of Lockyear & Kornblum, and petitions the Court for rehearing pursuant to the provisions of Appellate Rule 11(A) of the Indiana Rules of Appellate Procedure, and in support thereof would show unto the Court as follows:

1. That the Court of Appeals of Indiana rendered an opinion in the within captioned cause on November 22, 1988.

2. That the opinion rendered by the Court of Appeals of Indiana was against the Defendant-Appellant.

3. That this Petition for Rehearing is timely filed within the period set forth in Appellate Rule 11 of the Indiana Rules of Appellate Procedure.

4. That the opinion rendered by the Court of Appeals of Indiana is erroneous in each of the following:

(a) In holding that the Indiana RICO Statute, I.C. 35-45-6-2, utilizing as predicate acts alleged violations of the Indiana Obscenity Statute, I.C. 35-49-3-3, is constitutional on

its face and as applied in this case in each of the following particulars:

(1) That I.C. 35-49-3-3 is impermissibly overbroad in its regulation of material deemed harmful to minors in that it prohibits access by adults of materials based upon a standard of what is suitable for minors in violation of the pronouncements of the United States Supreme Court in *Butler* v. *Michigan*, (1957) 352 U.S. 380, 1 L.Ed.2d 412, 75 S.Ct. 524 and *Bolger* v. *Youngs Drug Products Corp.*, (1983) 463 U.S. 60, 77 L.Ed.2d 469, 103 S.Ct. 2875.

(2) That I.C. 35-49-3-3 is in violation of the Establishment Clause of the First Amendment to the Constitution of the United States in that said statute impermissibly grants a preference to churches and is, therefore, unconstitutional under the United States Supreme Court pronouncements in *Lemon* v. *Kurtzman*, (1971) 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 and *Larkin* v. *Grendel's Den*, (1982) 459 U.S. 116, 74 L.Ed.2d 297, 103 S.Ct. 505.

(3) That I.C. 35-49-3-3 is unconstitutionally vague in that said statute fails to apprise persons of common intelligence of the conduct sought to be prohibited in that reasonable persons are not put on notice by the terms of the statute as to what conduct is prohibited. For example, the statute fails to define from what point the applicable distance is to be

measured; fails to define what is to be determined to be a school or church.

(4) That I.C. 35-49-3-3 on its face and as applied in this case is in violation of the Fourteenth Amendment to the Constitution of the United States in that it denies the Appellant herein equal protection of the law by utilizing the Obscenity Statute as a predicate act in that said statute sets forth a classification of particular businesses; *i.e.*, those dealing in protected First Amendment materials to the exclusion of all other businesses.

(5) That I. C. 35-49-3-3 is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States as it operates as an unlawful taking without just compensation in that said statute fails to include a "grandfather" provision. The principal effect of such failure is to prohibit the defendant's business from continuing its operation when such business was otherwise lawfully conducted prior to the enactment of the statute.

(6) That I.C. 35-45-6-2, the RICO Statute, utilizing I.C. 35-49-3-3, the Indiana Obscenity Statute, as predicate acts has an impermissible chilling effect upon the exercise of protected First Amendment rights.

(7) That I.C. 35-45-6-2 and I.C. 35-49-3-3 are unconstitutional in that they lack

a scienter requirement, an essential element of an obscenity related prosecution.

(b) The opinion rendered by the Court of Appeals of Indiana fails to give a statement in writing as to each constitutional question raised on the record and argued by the parties, which said constitutional issues are substantial and are set forth in 4(a)(1-6) above. The issue of overbreath was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(a)(e) and (f) (Record p. 1-30) and briefed by Defendant-Appellant in Appellant's Brief at page 29. The Establishment Clause issue was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(a) and (f) and briefed by Defendant Appellant in Appellant's Brief at page 34. The issue of vagueness was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(a) and (f) and brief[ed] by Defendant-Appellant in Appellant's Brief at page 36. The issue of equal protection under the Fourteenth Amendment was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(a) and (g) and brief[ed] by Defendant-Appellant in Appellant's Brief at page 42. The issue of an unlawful taking without just compensation was preserved in the Record in the Motion to Correct Errors in rhetorical paragraphs 3(a) and 4 and briefed by Defendant Appellant in Appellant's Brief at page 46. The issue of an impermissible chilling effect upon protected First Amend-

ment rights was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(a) and (d) and briefed by Defendant-Appellant in Appellant's Brief at page 49. The issue pertaining to the lack of a scienter requirement was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(c) and briefed by Defendant-Appellant in Appellant's Brief at page 50. That the failure of the Court of Appeals' decision to render a statement in writing of each of the questions presented above has prejudicially resulted in the affirmance of this appeal.

(c) That the opinion rendered by the Court of Appeals of Indiana contravenes a ruling precedent of the United States Supreme Court in *Butler* v. *Michigan*, (1957) 352 U.S. 380, 1 L.Ed.2d 412, 75 S.Ct. 524 and *Bolger* v. *Youngs Drug Products Corp.*, (1983) 463 U.S. 60, 77 L.Ed.2d 469, 103 S.Ct. 2875, in that I.C. 35-49-3-3, as analyzed under the principals [*sic*] announced in said decisions, is impermissibly overbroad in that it denies adults access to materials based upon a standard applicable only to minors.

(d) In holding that the Defendant-Appellant may be tried on an Amended Indictment which was never submitted to a grand jury or which complied with the provisions of I.C. 35-34-1-2(b)(1) providing that the Indictment shall be signed by the foreman or five (5) members of the grand jury and failed to comply with I.C. 35-34-2-12(b) which provides, in part, the Indictment must be endorsed with the phrase "a true bill".

(e) That the opinion rendered by the Court of Appeals of Indiana contravenes a ruling precedent of the Indiana Supreme Court as set forth in *Walker* v. *State*, (1968) 251 Ind. App. 432, 241 N.E.2d 792, in that the Court lacked jurisdiction to proceed upon an Amended Indictment not endorsed with the phrase "a true bill" and signed by the foreman of the grand jury or five (5) members of the grand jury.

(f) That the opinion of the Court of Appeals of Indiana purports to follow the ruling precedent of the Indiana Supreme Court in *4447 Corporation* v. *Goldsmith*, (1987) Ind. 504 N.E.2d 559 (Petition for Certiorari currently pending in the United States Supreme Court), but that such ruling in *4447 Corporation* is erroneous and/or in need of clarification or modification in that the issues presented in the instant appeal are separate and distinct issues from that present and ruled on in *4447 Corporation*. *4447 Corporation* principally dealt with the permissibility of prejudgment and hearing seizure of purportedly obscene materials. That issue is not involved in the instant case. The principal issue herein involved is the permissibility of denying adults access to protected materials based upon a standard of whether such materials are suitable for minors where it has been stipulated that no minors had visual, auditory, or physical access to the materials. The opinion of the Court of Appeals fails to give a statement in writing as to such substantial question raised in the

Record in the Motion to Correct Errors in paragraph 3, Record page 1, and briefed by the Defendant-Appellant in Appellant's brief commencing at page 29.

(g) In holding that the correct method of measurement under I.C. 35-49-3-3(3) is a straight line measurement between two (2) points where said statute is silent with respect to said matter. Evidence of conflicting distance measurements were presented and included in the Record, which are over the proscribed statutory distance, and the State of Indiana failed to carry its burden of proof on said issue.

WHEREFORE, Defendant-Appellant respectfully prays the Court to grant this Petition for Rehearing; vacate its opinion of November 22, 1988; and, reverse the conviction of the Defendant Appellant and remand the case to the Trial Court with instructions to grant the Defendant-Appellant's Motion to Dismiss and Motion to Dismiss for Lack of Jurisdiction.

Respectfully submitted,

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# APPENDIX K

## ORDER DENYING RECONSIDERATION

(State of Indiana — Court of Appeals)

(Dated January 31, 1989)

(STUDIO ART THEATRE OF EVANSVILLE, INC., v. STATE OF INDIANA — Cause Number 82A01-8805-CR-00152; LOWER CAUSE #5436)

You are hereby notified that the COURT OF APPEALS has on this day [1/31/89]

APPELLANT'S PETITION FOR REHEARING DENIED.

WESLEY RATLIFF JR., CHIEF JUDGE

(*Certification Omitted*)

Supreme Court, U.S.
FILED
MAR 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-847 (2)

In The

# Supreme Court of the United States

October Term, 1989

STUDIO ART THEATRE OF EVANSVILLE, INC.,
*Petitioner,*

vs.

STATE OF INDIANA,
*Respondent*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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25 pp

## QUESTION PRESENTED

Whether a state may impose criminal penalties for the sale of materials which are obscene as to minors within 500 feet of a church or school.

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No. 89-847

In The

# Supreme Court of the United States

October Term, 1989

STUDIO ART THEATRE OF EVANSVILLE, INC.,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

Respondent, State of Indiana, respectfully requests the Court to deny the issuance of a Writ of Certiorari directed to the Court of Appeals of Indiana and, thereby, refuse to review the decision entered by that court in Cause Number 82A01-8805-CR-152 on November 22, 1988.

## OPINION BELOW

The opinion of the Court of Appeals of Indiana, First District, was rendered on November 22, 1988, and is reported at 530 N.E.2d 750 and set forth as Exhibit B to the Petition. A petition for rehearing was denied without opinion on January 31, 1989, and the Supreme Court of Indiana denied transfer on September 21, 1989.

## STATEMENT OF THE CASE

This appeal is from a conviction for violation of Indiana's "Criminal Racketeer Influenced and Corrupt Organization Act" ("RICO statute"), IND.CODE § 35-45-6-2(a)(3), predicated upon acts alleged to be violations of IND.CODE § 35-49-3-3(3). That provision is the "obscenity as to minors" portion of the obscenity statute.

The facts in this case were determined in the trial court through stipulation.

In essence, the facts are as follows: Petitioner is a corporation which operates a "retail adult entertainment business" at 2113 West Franklin Street, in Evansville. As part of that business it owned and displayed or sold to adults four particular films on videocassette. The four films were entitled "Teenage Runaway," "Seduction of Lana Shore," "Boys in the Bath," and "Geisha's Slave." Petitioner stipulated that all four films contain "depictions of sexual conduct, nudity, and sexual excitement." It further stipulated that all four films, each taken a a whole, appeal "to the prurient interest in sex of minors," are "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable

matter for minors," and that when each is considered as a whole they lack "serious literary, artistic, political or scientific value for minors." Petitioner stipulated that it "participated" in the display or sale of films. It stipulated that the premises mentioned above were less than 500 feet from a school and two churches when measured by a straight line from a point in the property lines.

## SUMMARY OF THE ARGUMENT

I. It is permissible to define a form of obscenity based upon harmfulness to minors and Indiana's statute does so with requisite clarity; the compelling State interest in protecting minors can be served, without needlessly preventing adults access to matter which while harmful to minors is not obscene to adults, by a proscription based upon geographical proximity to places where children regularly congregate, i.e., schools and churches; the proscription is not an establishment of religion but is based on the religiously neutral issue of the likelihood of the regular presence of children; and equal protection is not infringed since the material covered by the statute is obscene (hence, non-protected) as to minors when any prohibitions are so limited.

II. The addition of the scienter provision "knowingly" was a permissible non-substantive amendment to the original indictment and, while the change as amended was retyped for convenience, the formal requirements of a grand jury foreman's signature and the words "a true bill" were satisfied by their inclusion in the original indictment. their inclusion in the original indictment.

## REASONS FOR DENIAL OF THE WRIT

### I.

### THE PREDICATE OBSCENITY STATUTE IS NOT UNCONSTITUTIONAL

Initially, Petitioner claims that the predicate "obscenity to minors" statute is unconstitutional because its subject is "non-obscene" (and hence presumptively protected) as to adults and precludes or limits distribution of such matter to adults; that basing its geographical scope upon proximity to a church is an "establishment" of religion prohibited by the First Amendment, and impermissibly delegates to a church a means to criminalize otherwise protected conduct; that the definition of "church" for this purpose is overly broad; and that the part of the scheme classifying and proscribing from limited areas "speech" deemed "harmful to minors" violates equal protection.

The State responds that it is permissible to define a form of obscenity based upon harmfulness to minors and that Indiana's statute does so with requisite clarity; that the compelling State interest in protecting minors can be served, without needlessly preventing adults access to matter which while harmful to minor is not obscene to adults, by a proscription based upon geographical proximity to places where children regularly congregates, e.g., schools and churches; that the proscription is not an establishment of religion but is based on the religiously neutral issue of the likelihood of the regular presence of children; and that equal protection is not infringed since the material covered by the statute is obscene (hence, non-protected) as to minors when any prohibitions are so limited.

Most of Petitioner's arguments are based on a claim of overbreadth. Thus, it is helpful to consider the guidelines for review of State statutes against overbreadth claims. Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985), reaffirmed these guidelines:

> 1. Never anticipate a question of constitutional law in advance of the necessity of deciding it.
> 2. Never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.
> 3. One to whom applicability of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.
> 4. The same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.
> 5. A law maybe narrowed by (1) legislative action, (2) judicial construction or (3) partial invalidation.
> 6. If a term in a statute is potentially overbroad, the law should be invalidated only so far as the term is to be understood as reaching protected materials.
> 7. Even if a term can only be interpreted in an unconstitutional sense, the proper remedy is to excise the term and leave the rest of the statute in place.

Petitioner recognizes that states are permitted to enact legislation to prevent exposure of minors to sexually explicit materials. On the other hand, the State may not fulfill that function by the expedient of banning material to the entire population (including adults) solely on the basis of its harmfulness to minors. Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524 (1957). The Michigan statute in that case made it an offense to make available to the general reading public a book found to have a potentially deleterious influence upon youth. Butler held the statute unconstitutional under the First and Fourteenth Amendments because it was not reasonably restricted to the evil which it was designed to prevent, thus reducing throughout the whole State of Michigan to reading only literature fit for children.

The State's ability to proscribe or limit access to a class of literature or other speech type material depends upon the well-established principle that a class of speech or press—obscenity—does not come within the area of constitutionality protected speech. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 419 (1973). The statute can only limit access to literature if it does so on the basis of its being obscene. A statute directed at speech on the basis of its harmfulness specifically to minors must still be premised on the speech's obscenity, even if it is only deemed obscene to minors. Petitioner's argument assumes that the question of obscenity of a given item is a simple yes-or-no proposition: An item unless it is obscene to adults, is fully protected by the first amendment, even as to minors, in defendant's point of view. The

State submits that this assumption cannot be valid where it is proper (as defendant concedes Butler holds) to restrict speech in any way based on unsuitability for children. Such a statute must be treated as having established a special class of obscene material: that which is obscene (and unprotected) as to minors. Such material must thus be analyzed as having a limited sort of obscenity, remaining protected as to adults. But it is erroneous to call it "non-obscene" or deem it protected beyond its permissible adult audience.

Since the statute must be analyzed as an obscenity statute, albeit one limited by the speech's harmfulness to and potential for display to minors, then the standards of Miller v. California, supra, should apply here, contrary to the argument of appellant. The Miller test is well known. It considers whether the average person "applying contemporary community standards" would find that "the dominant them of the matter or performance, taken as a whole, appeals to the prurient interest in sex"; whether it depicts or describes sexual conduct "in a patently offensive way"; and whether taken as a whole it "lacks serious literary, artistic, political, or scientific value." Subsequently it has been held that "patent offensiveness" is to be judged also by the "contemporary community standards" test. Furthermore, "sexual conduct" must be specifically defined. Miller, supra. "Sexual conduct" is specifically defined in IND.CODE § 35-49-1-8. The obscene-to-minors statute may apply if either of these elements, or if "nudity" (specifically defined in IND.CODE § 35-49-1-5) or "sexual conduct" (specifically defined by IND.CODE § 35-49-1-9) are depicted or represented. This fully meets the requirement of Miller to specifically define the "sexual conduct" component of an obscenity statute. The three-pronged

Miller test (prurient interest when taken as a whole, patent offensiveness, and lack of value as a whole), as considered with reference to a minor audience, is the test used to determine if matter is "harmful to minors." This fully complies with Miller and so should be considered as a viable definition of a class of obscenity which applies in reference to minors.

Appellant stipulated that all four movies had all the characteristics of material defined as "harmful to minors" in IND.CODE § 35-49-2-2. The State would contend that this amounts to a stipulation that the movies were "obscene to minors" and that the State may therefore take reasonable measures to restrict their presence in areas near large gatherings of children, short of unduly preventing their access by the adult public.

Parenthetically, one must note that the Petitioner's ability to describe these films as having all the components of being "harmful to minors" as defined in IND.CODE § 35-49-2-2 necessarily means that the definition was not vague in its applicability to the video tapes. Further, the efforts Petitioner undertook (as Petitioner says more than once in its brief) to ensure no sale or display of its stock to minors—indeed, the store's very own self-description as an "adult" book store—must be taken as implicitly admitting that the store's stock in trade is harmful to minors. No, Petitioner cannot credibly complain of being misled by any purported vagueness of IND.CODE § 35-49-2-2.

Petitioner then discusses the purported overbreadth of IND. CODE 35-49-3-3(3). This is the only subsection of the statute that does not require a showing that minors did see or

were displayed the harmful material, or that the matter was displayed in an area accessible to children without their guardians. It proscribes sale or display of harmful material within 500 feet of a church or school. But Petitioner's argument relies on the Miller case, supra, and its progeny such as Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875 (1983); and Home Box Office v. Wilkinson, 531 F.Supp. 987, (D.C. Utah, 1982), which are all cases where a restriction limited the general adult reading or viewing public access to matter they were entitled to have if they wanted it. The instant statute, however, has no such effect. Its ambit is strictly limited to sale or display 500 feet or less—a minute's walk, perhaps—from churches and schools. Since by far the greatest percentage of land is outside such bounds, this amounts to no real infringement at all upon the adult viewing community's ability to get any material.

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981), and Schneider v. State of New Jersey, 308 U.S. 147, 60 U.S. 147 (1981), are fully distinguishable. Mt. Ephraim attempted to ban all dramatic presentations from the whole borough. In Schneider, the various jurisdictions (Los Angeles, CA; Irvington, NJ; Milwaukee, WI; and Worcester, MA) variously prohibited hand-bills and the like, except for the New Jersey town which prohibited all door-to-door canvassing or distribution of circulars without police permission. Thus, Schneider and Schad both involved the prohibition of a form of protected speech in public places throughout a community's jurisdiction. Los Angeles and Worcester prohibited distribution anywhere on their streets and alleys. The Court held that it was unavailing to argue that they could be distributed in other public places, since "the streets are natural and proper places for the dissemination of information and opinion . . ."

The instant statute is very narrow in its geographical range. It by no means prevents dissemination of material in a community in any way approafching the breadth of the restrictions in Schad or Schneider. Surely, it cannot be maintained that near schools and churches is the "appropriate" place to display or sell matter that is harmful to minors. If Michigan in the Butler case attempted to "burn the house to roast the pig" (as Justice Frankfurter put it) Indiana's statute keeps its heat in the oven.

Petitioner claims a violation of the establishment clause in including churches, with schools, as a basis for defining the area where IND.CODE § 35-49-3-3 proscribes sales of matter "harmful to children." But the statute passes the standard test of Establishment Clause violations, Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971): The Statute: (1) has the "secular legislature purpose" of protecting minors from harmful material; (2) neither advances nor inhibits religion as its primary or principle effect; and (3) does not foster "excessive government entanglement with religion."

The only one of these prongs contended to be present here is the "excessive entanglement" one. Appellant analyzes to Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S.Ct. 505 (1985). There, an ordinance both advanced religion and created excessive entanglement by granting to all churches an optional power to compel an alcoholic beverage licensing commission to deny a license to any establishment within 500 feet. The crucial distinction is that the Larkin case's statute granted to any church a discretionary power to direct the outcome of a governmental determination. No such grant of governmental power is present here.

To try to establish an analogy, Petitioner posits that case of a church deliberately moving into the 500-foot radius of an adult bookstore for purpose of "criminalizing" its business. This must be rejected as speculative. There is no showing of record who was there first in this case, the churches or the store. The State suggests that, consistent with the principles of overbreadth claims as stated in Brockett, supra, this Court should wait until some such case appears and then decide whether the statute should be interpreted as not applying to "pre-existing uses."

Petitioner claims that statute is vague as regards the means to determine the 500-foot limit, and the definitions of "school" and "church." The State submit that in all cases the commonly understood, non-technical definition of these terms are perfectly apparent, so that the words are not apt to create any genuine uncertainty. "School" is usually felt to be an elementary or secondary school, grades K-12. Such a definition comports well with the statute's purpose. This is not such a case where there is uncertainty whether a "Methodist Church" or a "Catholic Church" is a "church" as contemplated by the statute. Again, "church" is a commonly understood term. And, absent any special qualifying language, the concept of being "X" distance "from" something is commonly understood as being that far on a straight line. The starting point is the nearest point on the property line of a church or school. That's clearly what the statute says. The statute does not discuss the location of the adult establishment's property line or front door. "Sale" or "display" is prohibited within 500 feet. The statute provides a clear way to find the area of the prohibition.

Petitioner claims that equal protection rights are violated by the statute by allegedly classifying "protected speech" into two types: "harmful to minors," the sale or display of which is geographically somewhat limited, and ordinary protected speech, which is unaffected. However, the State has already demonstrated that speech "harmful to minors" is a form of unprotected speech as it affects minors, rather than "protected speech." Petitioner's argument thus does not apply.

Thus arises the issue of how minors are "affected" by the statutory scheme. Does a 500-foot limit advance the State interest in protecting minors? Petitioner claims the prohibition of actual display or sale would be sufficient, and nothing more is added by the 500-foot limit. This is appellant's view under the test of City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249 (1985), it is protected by the First Amendment. Cleburne would sustain the 500-foot limit only if necessary to promote the compelling state interest; and the means chosen by the State must be precisely drawn as necessary to achieve this goal. Cleburne, supra; Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 100 S.Ct. 2326 (1979). Protecting minors is a compelling state interest. The mere closing of an adult store to minors is not enough to achieve that goal. Most people who have gotten through their teens are aware of ways to circumvent age limits, ranging from false i.d. to hiring an adult to make the purchase. It is a well-known trait, particularly in children and adolescents, that the mere existence of a prohibition stimulates the desire for that which is prohibited. The nearer to school or church, where young people in large numbers are regularly and frequently together, the more visible and alluring a temptation the adult bookstore will be. The way there is the one the young person will most readily know. To be sure, there is nothing magic about 500 feet. But

it must be the case that the farther away the store, and, hence, the less associated with school or church, the less this type of temptation and opportunity are present. Twelve hundred feet or two miles limits might not be defensible, but 500 feet is a fairly respectable distance and is probably a good compromise between serving the state interest and avoiding actual infringement of adult access to the material.

Petitioner claims an additional unlawful "taking" in the claimed enactment of IND.CODE § 35-49-3-3(3) after the founding of its store. However insofar as the State can determine, the age of the store is not a matter of record here.

The current IND.CODE § 35-49-3-3 was enacted in 1983. P.L. 311-1983, Sec. 33. Its predecessor statute, IND.CODE § 35-30-11.1-1(3)(repealed) also contained the same prohibition on sale or display to any person of material which was harmful to minors within 500 feet of the nearest church or school property line. It was enacted in 1975. P.L. 342, § 1, p. 1816. There is nothing in this record from which to infer Petitioner's business was at that premises any earlier than that. Indeed, Petitioner did not exist prior to September 18, 1978, when it was incorporated.

Petitioner attacks the obscenity statute on the basis of an alleged lack of a scienter provision. As related to these facts, (that is, omitting irrelevant language), the statute reads: "A person who knowingly ... displays for sale to any person matter that is harmful to minors within five hundred (500) feet of the nearest property line of a ... church ... commits a Class

A misdemeanor." IND.CODE § 35-49-3-3(3). It is true that specific allegations and proof of knowledge are required in an obscenity case. Pursuant to the rules for overbreadth, Brockett, supra, the terms "knowingly" or "intentionally" must be construed narrowly, so they must be held to refer to knowledge or intent of the circumstance that is required for conviction: Namely, these "scienter" terms must be construed to mean knowledge that contents of obscene material are "obscene" or "harmful to minors." Proof of the scienter element may be established by circumstantial evidence. Richards v. State, Ind.App., 461 N.E.2d 744 (1984); Sedelbauer v. State, Ind., 428 N.E.2d 206, (1981), cert. denied 455 U.S. 1035. (Petitioner does not claim that the State failed to prove this scienter element.)

Indiana's statute adequately defines the crime (including descriptions of what is "harmful to minors" and a scienter provision construed to mean knowledge of the nature of the contents). Its limited geographic scope does not act in any meaningful way to limit adult access to material that is protected as to adults. It does not rest on any grant of preference that promotes or establishes religion, nor does it entangle religion in the governmental process. There is a rational basis for a statute that prohibits sale of sexual matter that is harmful to minors within 500 feet of a church or school. The statutory language has a clear meaning that this distance is a "straight line" measure. This meaning legitimately advances the purpose of the statute.

In short, IND.CODE § 35-49-3-3(3), as applied, should be held to be constitutional.

The Indiana RICO statute closely resembles the federal RICO statute. 18 U.S.C. § 1961 et seq. The police reasons for the adoption of RICO statutes are clearly set forth in Russello v. United States, 464 U.S. 16 (1983) and need not be repeated here. The federal statute has withstood challenges for vagueness and overbreadth. United States v. Tripp, 782 F.2d 38, (6th Cir., 1986), cert. denied, 106 S.Ct. 1656; United States v. Martino, 648 F.2d 367 (5th Cir., 1981), reconsidered in part, 650 F.2d 651, cert. denied 456 U.S. 943, 949, on reh. f681 D.2d 952, affirmed 104 S.Ct. 296; United States v. Sividerski, 593 F.2d 1246 (D.C. Cir., 1978), cert. denied 441 U.S. 933.

This Court has considered the question of whether the RICO statutory scheme even (including the RICO civil remedies statute IND.CODE § 34-4-30.5-2) as it pertains to the predicate offense of obscenity violates the First and Fourteenth Amendments to the United States Constitution. Fort Wayne Books, Inc. v. Indiana, 489 U.S. __, 103 L.Ed.2d 34 (1989). The Fort Wayne Books case contains a detailed analysis, that need not be repeated here. This Court concluded that such application of the statute did not violate the Constitution. Petitioner here makes essentially the same claims rejected there.

## II.

## THE CHARGING INSTRUMENT IS NOT FATALLY DEFICIENT AS TO FORM

In this issue, Petitioner contests failure to dismiss the Amended Indictment where, when amended (an amendment it claims impermissibly went to substance), it lacked the signature of any grand juror or the words "a true bill."

The State responds that the addition of the scienter provision "knowingly" was a permissible non-substantive amendment to the original indictment and that, while the charge as amended was retyped for convenience, the formal requirements of a grand jury foreman's signature and the words "a true bill" were satisfied by their inclusion in the original indictment.

Indiana Code 35-34-1-12(b) requires that an indictment to be valid, must be signed by the foreman or five other grand jurors, and be endorsed with the words "a true bill." If this requirement is not to be considered mere meaningless formalism, it must be seen to have a purpose. This subsection requires that five jurors, at least, concur. The endorsement, "a true bill" and the signature or signatures must be intended to certify that the indictment as presented is the actual charge concurred in by a majority of the grand jury. It shows a proper return of an indictment to the court by the grand jury. Epps v. State, 102 Ind. 539, 1 N.E. 491 (1885).

Once an indictment is returned the State, by the prosecutor, may amend the indictment. If the indictment is not one of substance, such amendment may occur at any time, so long as petitioner is afforded an adequate opportunity to prepare his defense. Pennington v. State, Ind., 523 N.E.2d 414 (1988); Daniels v. State, Ind., 453 N.E.2d 160 (1983). Immaterial defects may be permitted to be cured by amendment. Starkes v. State, Ind., 517 N.E.2d 46 (1987). Changes of form are also permissible. Henderson v. State, 273 Ind. 334, 403 N.E.2d 1088 (1980).

Here, the State dropped several counts and added the scienter provisions "knowingly." This change did not alter in any way the applicability to the charges of any evidence the petitioner might have. Nor did it affect any available defense. Hence, it was a change of form only, and not of substance. Hence, it was a permissible amendment. See Johnson v. State, 258 Ind. 383, 287 N.E.2d 473 (1972).

In this case the signature and endorsement properly appeared on the indictment as originally presented. This was adequate to inform the court that the grand jury had in fact returned such an indictment. This prosecutor made a permissible amendment. He could have interlineated and scratched omitted portions out all over the original indictment. Instead, he amended the indictment by having it typed up as amended. If he is permitted to amend, why not allow him to do so by presenting a clean new document embodying the amended text? (The prosecutor's signature in the space originally occupied by the foreman's may then be seen as his endorsement of the amendments.)

Petitioner's argument should be rejected as an attempt to elevate substance over form.

## CONCLUSION

For the foregoing reasons, the Respondent, State of Indiana, respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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